THE LAW REPORTER.

OCTOBER, 1845.

DEATH OF MR. JUSTICE STORY.

For the present number of the Law Reporter we had prepared and put in type a sketch of the life and character of that great lawyer and good man, Sir Samuel Romilly. An event has recently occurred, however, which makes it our melancholy duty to devote this portion of our Journal to an account of one, who has been among its firmest friends and ablest contributors from the first, and whose recent death has cast a gloom over the whole community. A greater than Sir Samuel Romilly has fallen in the midst of us. The death of Mr. Justice Story will create a void in the judiciary, in the professor's chair, and in the social and literary circle, which no living man can fill. Having given a full sketch of the life of the deceased in a former number of this Journal, (2 Law Reporter, 193, November, 1839,) we do not propose at the present time to go over the same ground, but shall content ourselves with a few remarks of a general character.

He was born Sept. 18, 1779, at Marblehead, in Massachusetts. His father, a respectable physician, had been a surgeon in the revolution. Young Story entered Harvard College, a year in advance, at the age of sixteen. He commenced the study of law with the late Chief Justice Samuel Sewall, of Marblehead, and completed his studies with Mr. Justice Putnam, then a practitioner in Salem. In 1801, he was admitted to the bar. In 1805, he was chosen a

representative of the town of Salem in the legislature of the commonwealth, where he served for several years. He was then elected a member of congress, and again, 1811, a member of the state legislature, when he was called to the speaker's chair. In November, 1811, the place of associate justice of the supreme court of the United States having become vacant by the decease of Mr. Justice Cushing, of Scituate, who had filled it from the organization of the government, it was tendered to Mr. John Quincy Adams, then in Russia, and by him declined, and to one or two others; whereupon Mr. Story, at the early age of thirty-two, was appointed to the important office which he held till his death. He was subsequently, in 1829, appointed Dane professor of law in Harvard University.

In the early part of his life Judge Story acted with the democratic party, and was an earnest politician. When Mr. Gore, in 1808, moved resolutions in the legislature of Massachusetts against the embargo, it devolved on Mr. Story to lead and close the debate in support of the policy of the administration. But on his election to congress he refused to act with the democratic party in all its measures; on the contrary, he advocated an increase of the navy and a repeal of the embargo. The correspondence of Mr. Jefferson shows that he looked upon Mr. Story with doubt and distrust, if not dislike. Mr. Story's political views and feelings undoubtedly underwent much change with age. He always exercised the elective franchise, and his political feelings and partialities were strong to the last.

As a lawyer and judge, his character is before the world. He was, during his whole life, a most indefatigable student, but such was his flow of spirits, and his economy of time, that he had much less the *appearance* of a student, than many men who labor far less, and accomplish comparatively nothing. His hours of labor were with the sun. The evening was spent in his family, or with his friends. He retired early, and was not an early riser, remarking on one occasion, that it was better for one to be wide awake when he did rise, than merely to rise early.[1] He was well versed in literature as well as law, and kept up with all the best, (if not

---

[1] This remark was made after attending a committee meeting, where Hon. John Quincy Adams and Hon. Josiah Quincy were present, who are very early risers, and who on that occasion indulged in those *nods* for which both are well known.

—— Aliquando bonus dormitat Homerus!

the poorest) writers of the day. He delighted especially in the works of Dickens, and we have heard of the surprise of a grave old practitioner in another state, where the judge was holding a circuit, at his glee in receiving a number of Barnaby Rudge. "Do you indulge in such light reading, Judge Story?" The clear ringing laugh of the judge at such a question, and the assertion *that he read nothing else*, did not tend to diminish our old friend's amazement. Indeed, one of the last books ever read to him before his last illness, was Barnaby Rudge. His fondness for poetry was very great, and he sometimes composed it.

As a writer of law treatises, Judge Story must be ranked among the first. The amount of labor in the bare transcribing of his works, is enormous. For the last few years, he literally kept the press at work all the time. But it is supposed that he wrote too many treatises for his own fame. Some of them are vast repositories of law, rather than well arranged treatises. Indeed, it was morally and physically impossible for any man, in the midst of such exhausting labors, to throw off the best commentaries upon a science, any department of which tasks the highest powers of the mind. And while all the works of Judge Story have been useful to the profession, it might have been better for his own reputation if they had been fewer, and written with more care and deliberation.

The true legal fame of Judge Story rests on his judicial labors. In his judgments — going over a period of more than thirty years, and embracing causes of every character — he has erected a monument that attests his vast learning, his legal acumen, his sound judgment, and his inflexible desire to do right. As a judge at *nisi prius*, his conduct has been open to criticism. His charges were invariably elaborate arguments. He always made his own opinions manifest, and although he at the same time informed the jury that they were to judge of the facts, he never hesitated to intimate his own opinion, and the verdict generally conformed to the charge. This course is adopted by many learned judges in this country, and in England, but we incline to the opinion, that the sentiment of the bar in both countries is against it. The *manner* of Judge Story on the bench was delightful. Although firm and dignified in his demeanor, his bearing towards the bar was kind, almost affectionate, and there was an entire absence of that cast-iron gravity, and the rough, bear-like, abrupt and boisterous manner, which judges have sometimes mistaken for firmness and dignity. At the same time, no judge ever sat upon the bench

who could assume a manner of greater severity, or who could more easily put down the pertness of callow lawyerlings, or the overbearing insolence of grey-haired veterans. Towards young men at the bar, in particular, the manner of Judge Story was most kind. Youth and age stood an equal chance at his tribunal, and many a practitioner can refer with kindly emotion to his first cause, when the judge encouraged, or protected, as the course of events seemed to require.

As a man of learning in every department of his profession, Judge Story was, manifestly, and beyond all question, preëminent. He was a thorough master of every branch of the law; he sported with the dryest technicalities, and was equally at home with questions that severely try the judgment, and appeal to the highest qualities of the mind. His fame is not his country's, alone; it is co-extensive with the common law; it reaches every state where the code of Justinian is known.

As a teacher, he was in the highest degree successful; and here some of the most estimable as well as the strongest traits of his character were manifest. With his pupils, his manner was always of the kindest and most familiar character. In the lecture room, in the moot court, or before the entrance of Dane Hall, when surrounded by law students, his manner was that of a father in his family, kind, sportive, and yet firm. His influence as a teacher and as a man has thus been sent to every part of our land, and there is not a state, and scarcely a town in the Union, where the notice of his death will not be read with moistened eyes by those who have been his pupils, and to whom his whole character and appearance will come up afresh. They will feel the warm grasp of his hand, on welcoming them to the school; his bright and beaming eye will again look out upon them from a countenance, glowing with happy thoughts, and from which a joyous smile was never absent in social converse; his clear, ringing, merry laugh; his quick and boylike step; his rapid, almost violent, utterance; his earnest eloquence; his keen perception of the ludicrous (which Horne Tooke considered the greatest blessing of life) all, all will come before them, and while they drop a tear to his memory, they will feel an assurance that a character so lovely and pure could lose nothing by "shuffling off this mortal coil."

The history and character of Judge Story are full of interest and instruction to the young members of the bar. In the first place, there is no soil upon his integrity as a man. He was theoretically and practically a Christian. He believed in the Bible,

and entered into its blessings with a childlike disposition, while its eloquence filled his soul with delight. "How beautiful," he exclaimed one day, while transacting some ordinary business at the desk where we are now writing, when some one happened to speak of a widow and her son — "How beautiful the description, 'he was the only son of his mother, and she a widow;' human eloquence strives in vain to reach it. Consider the scene — a funeral procession — Christ at the bier — a son, *the only son of his mother, and she a widow.* Why do not young men study the Bible?" Throughout his life he has been, in all respects, a pattern for the young. Then, consider his industry from his first commencement at the bar. Look at him at 60 years of age — the senior judge of the supreme court, holding all the circuit courts himself; hearing the heaviest and most difficult causes that were ever tried in this country. At the same time performing his duties as a professor in the Law School, and sending through the press every year a quantity of matter, the bare writing of which would appal an ordinary man. And during all this period, he had time enough for his friends. He spent his evenings with his family; he never worked before breakfast, and it never seemed to be any interruption to him for persons to call on him. The great secret was a wise economy of time; *he was always either at work or at play;* and whichever he did, he did with his whole heart. He had none of that listless, indifferent, flabby state of mind that able men sometimes fall into. Nor did he ever lose a moment in vain regrets or melancholy musings. At every period of his life he was ready to exclaim with the great orator of antiquity; "Ægritudinem laudare, unam rem maxime detestabilem, quorum est tandem philosophorum?"

Judge Story, for a few years past, has been troubled at times by a violent inflammation of the bowels. During the past summer, however, his health seemed as good, or better, than usual; and he very recently delivered elaborate opinions in several cases which involved large amounts of property and important principles of law; such as *Doggett* v. *Emerson*, in which the whole doctrine of equity, in relation to fraudulent sales, was examined with the greatest elaborateness; *Veazie* v. *Williams*, relating to the doctrine of auction sales; *Emerson* v. *Davies*, in which he examined with much fulness the law of copyright. He also left a manuscript opinion in the case of *Tobie* v. *County of Bristol.* He had fully made up his mind to resign his seat before October, and arrangements had been made by which he was to devote his

time to the duties of his professorship. A new professorship of commercial law had been spoken of, and he would have occupied the chair. On Monday morning, the 1st of September, he was taken violently ill, and on Wednesday evening, the 10th, at a quarter before nine o'clock, he died, having nearly completed the sixty-sixth year of his age.

It only remains to conclude this hasty sketch, by copying from the Boston Advertiser, a tribute to the deceased, written by Mr. Charles Sumner, who was long the intimate friend of the deceased, and knew him as well, perhaps, as any other man, in all the relations of life.

THE FUNERAL OF MR. JUSTICE STORY.

I have just returned from the last sad ceremony of the interment of this great and good man. Under that roof, where I have so often seen him in health, buoyant with life, exuberant in kindness, happy in his family and friends, I gazed upon his mortal remains, sunk in eternal rest, and hung over those features, to which my regards had been turned so fondly, from which even the icy touch of death had not effaced all the living beauty. The eye was quenched, and the glow of life was extinguished; but the noble brow seemed still to shelter, as under a marble dome, the spirit that had fled. And is he, indeed, dead, I asked myself; — he whose face was never turned to me except in kindness, who has filled the world with his glory, who has drawn to his country the homage of foreign nations, who was of activity and labor that knew no rest, who was connected by duties of such various kinds, by official ties, by sympathy, friendship and love, with so many circles, who, according to the beautiful expression of Wilberforce, "touched life at so many points" — has he, indeed, passed away! Upon the small plate on the coffin was inscribed, "Joseph Story, died September 10th, 1845, aged 66 years." These few words might apply to the lowly citizen, as to the illustrious judge. Thus is the coffin-plate a register of the equality of man, when he has laid aside the brief distinctions of life.

At the house of the deceased we joined in religious worship. The Rev. Dr. Walker, the present head of the University, in earnest prayer, commended the soul of the departed to God, who gave it, and invoked a consecration of their afflictive bereavement to his family and friends. From the house we followed the body, in mournful procession, to the resting place, which he had selected for himself and his family, amidst the beautiful groves of Mount Auburn. As the procession filed into the cemetery I was touched by the sight of the numerous pupils of the Law School, with countenances of sorrow, ranged with uncovered heads on each side of the road within the gate, testifying by this silent and unexpected homage their last respects to what is mortal in their departed teacher. Around the grave, as he was laid in the embrace of the mother earth, was gathered all in our community that is most distinguished in law, in learning, in literature, in station; the judges of our courts, the professors of the university, surviving class-mates of the deceased, and a thick cluster of friends. He was placed among the children who had been taken from him in early life, whose faces he is now beholding in heaven. "Of such is the kingdom of heaven," are the words which he has inscribed over their names on the simple marble which now commemorates alike the children and their father. Nor is there a child in

heaven, of a more child-like innocence and purity, than he, who, full of years and worldly honors, has gone to mingle with these children. Of such, indeed, is the kingdom of heaven.

There is another sentence inscribed by him on this family stone, which speaks to us now with a voice of consolation. "Sorrow not as those without hope," are the words which brought a solace to him in his bereavements; from his bed beneath he seems to whisper them among his mourning family and friends; most especially to her, the chosen partner of his life, from whom so much of human comfort is apparently removed. He is indeed gone; but we shall see him once more forever; in this blessed confidence, we may find happiness in dwelling on his virtues and fame on earth, till the great consoler Time shall come with healing on his wings.

From the grave of the judge I walked a few short steps to that of his class-mate and friend, the beloved Channing, who died less than three years ago, aged 63. Thus these companions in early studies, each in after life foremost in the high and important duties which he had assumed, pursuing divergent paths, yet always drawn towards each other by the attractions of mutual friendship, again meet and lie down together in the same sweet earth, in the shadow of kindred trees, through which the same birds shall sing their perpetual requiem.

The afternoon was of unusual brilliancy, and the full-orbed sun gilded with mellow light the funereal stones through which I wound my way, as I sought the grave of another friend of my own, the first associate of the departed judge in the duties of the Law School, Professor Ashmun. After a life crowded with usefulness, he laid down the burthen of ill health which he had long borne, at the early age of 33. I remember listening to the flowing discourse which Mr. Justice Story pronounced over the remains of his associate in the college chapel, in 1833; nor can I forget his deep emotion, as we stood together at the foot of the grave, while the earth fell, dust to dust, upon the coffin of his friend.

Wandering through this silent city of the dead, I called to mind those words of Beaumont on the tombs in Westminster:

> Here 's an acre sown indeed,
> With the richest, royall 'st seed
> That the earth did e'er suck in,
> Since the first man died of sin.
> Here are sands, ignoble things,
> Dropt from the ruined sides of kings.

The royalty of Mount Auburn is of the soul. The kings that slumber there were anointed by a higher than earthly hand.

Returning again to the grave of the departed judge, I found no one there but the humble laborers, who were then smoothing the sod over the fresh earth. It was late in the afternoon, and the upper branches of the stately trees that wave over the sacred spot, after glowing for a while with the golden rays of the setting sun, were left in the same gloom which had already settled on the grass beneath. I hurried away, and as I reached the gate the porter's curfew was tolling, to forgetful musers like myself, the knell of parting day.

As I left this consecrated field, I thought of the pilgrims that would come from afar, through long successions of generations, to look upon the last home of the great jurist. From all parts of our own country, from all the lands where law is taught as a science, and where justice prevails, they shall come to seek the grave

of their master. Let us guard, then, this precious dust. Let us be happy that, though his works and his example belong to the world, his sacred remains are placed in our peculiar care. Be to us, also, who saw him face to face in the performance of all his various duties, and who sustain a loss so irreparable in our own circle, the melancholy pleasure of dwelling with household affection upon his transcendant excellencies.

His death makes a chasm which I shrink from contemplating. He was the senior Judge of the highest Court of the country, an active Professor of Law, and a Fellow in the Corporation of Harvard University. He was in himself a whole triumvirate; and these three distinguished posts, now vacant, will be filled, in all probability, each by a distinct successor. It is, however, as the exalted jurist, that he is to take his place in the history of the world, high in the same firmament, from whence beam the mild glories of Tribonian, of Cujacius, of Hale and of Mansfield. It was his fortune, unlike many of those who have cultivated the law with signal success on the European continent, to be called upon as a Judge practically to administer and apply it in the actual business of life. It thus became to him not merely a science, whose depths and intricacies he explored in his closet, but a great and god-like instrument, to be employed in that highest of earthly functions, the determination of justice among men. While the duties of the magistrate were thus illumined by the studies of the jurist, the latter were tempered to a finer edge by the experience of the bench.

In attempting any fitting estimate of his character as a jurist, he should be regarded in *three* different aspects, as a judge, an author, and a teacher of jurisprudence, exercising in each of these characters a peculiar influence. His lot is rare who achieves fame in a single department of human action; rarer still is his who becomes foremost in many. The first impression is one of astonishment that a single mind, in a single life, should be able to accomplish so much. Independent of the incalculable labors, of which there is no trace, except in the knowledge, happiness and justice which they helped to secure, the bare amount of his written and printed labors is enormous beyond all precedent in the annals of the common law. His written judgments on his own circuit, and his various commentaries, occupy *twenty-seven* volumes, while his judgments in the Supreme Court of the United States form an important part of no less than *thirty-four* volumes more. The vast juridical labors of Coke and Eldon, which seem to clothe the walls of our libraries, must yield in extent to his. He is the Lope de Vega, or the Walter Scott of the common law.

We are struck next by the universality of his juridical attainments. It was said by Dryden of one of the greatest lawyers in English history, Heneage Finch,

> Our law that did a boundless ocean seem
> Were coasted all and fathomed all by him.

But the boundless ocean of that age was a *mare clausum* compared with that on which the adventurer embarks in our day. We read in Howell's Familiar Letters, that it had been said only a few short years before the period of Finch, that the books of the common law might all be carried in a wheelbarrow! To coast such an ocean were a less task than a moiety of his labors whom we now mourn. Called upon to administer all the different branches of law, which are kept separate in England, he showed a perfect mastery of all. His was Universal Empire; and wherever he set his foot, in the wide and various realms of jurisprudence, it was as a sovereign; whether in the ancient and subtle learning of real

law, in the criminal law, in the niceties of special pleading, in the more refined doctrines of contracts, in the more rational systems of the commercial and maritime law, in the peculiar and interesting principles and practice of courts of admiralty and prize, in the immense range of chancery, in the modern but most important jurisdiction over patents, or in that most exalted region, the great themes of public and constitutional law. There are judgments by him in each of these branches which will not yield in value to those of any other judge in England or the United States, even though his studies and duties may have been directed to only one particular department.

His judgments are remarkable for their exhaustive treatment of the subjects to which they relate. The common law, as is known to his cost by every student, is to be found only in innumerable "sand-grains" of authorities. Not one of these is overlooked in these learned judgments, while all are combined with care, and the golden cord of reason is woven across the ample tissue. Besides, there is in them a clearness, which flings over the subject a perfect day; a severe logic, which by its closeness and precision, makes us feel the truth of the saying of Leibnitz, that nothing approached so near the certainty of geometry, as the reasoning of the law; a careful attention to the discussions at the bar, that the court may not appear to neglect any of the considerations urged; and a copious and persuasive eloquence which gilds the whole. Many of his judgments will be land-marks in the law; they will be columns, like those of Hercules, which shall mark the progress in jurisprudence of our age. I know of no single judge who has established so many. I think it may be said, without fear of question, that the Reports show a larger number of judicial opinions, from Mr. Justice Story, which posterity will not willingly let die, than from any other judge in the history of English and American law.

But there is much of his character, as a judge, which cannot be preserved, except in the faithful memories and records of those whose happiness it was to enjoy his judicial presence. I refer particularly to his mode of conducting business. Even the passing stranger bears witness to his suavity of manner on the bench, while all the practitioners in the courts, over which he presided so long, attest the marvellous quickness with which he habitually seized the points of a case, often anticipating the slower movements of the counsel, and leaping, or, I might almost say, flying to the conclusions sought to be established. Napoleon's perception in military tactics was not more rapid. All will attest the scrupulous care with which he assigned reasons for every portion of his opinions, showing that it was not *he* who spoke with the voice of authority, but the *law*, whose organ he was. And all will reverence the conscientious devotion and self-sacrifice which he brought to the performance of his responsible duties.

In the history of the English bench, there are but two names with combined eminence as a judge and as an *author* (Coke and Hale); unless, indeed, the orders in chancery from the Verulamian pen should entitle Lord Bacon to this distinction, and the judgments of Lord Brougham should vindicate the same for him. Blackstone's character as a judge is lost in the fame of the Commentaries. To Mr. Justice Story belongs this double glory. Early in life, he compiled an important professional work; but it was only at a comparatively recent period, after his mind had been disciplined by the labors of the bench, that he prepared those elaborate Commentaries, which have made his name a familiar word in foreign countries. Those who knew him best, observed the lively interest which he took in this extension of his well-earned renown. And well he might; for

the voice of distant foreign nations seems to come as from a living posterity. His works have been reviewed with praise in the journals of England, Scotland, Ireland, France, and Germany. They have been cited as authorities in all the courts of Westminster Hall; and one of the ablest and most learned lawyers of the age, whose honorable career at the bar has conducted him to the peerage, Lord Campbell, in the course of debate in the House of Lords, characterized their author as "the first of living writers on the law."

To complete this hasty survey of his character as a jurist, I should allude to his excellencies as a *teacher* of law, that other relation which he sustained to jurisprudence. The numerous pupils reared at his feet, and now scattered throughout the whole country, diffusing, each in his circle, the light which he obtained at Cambridge, as they hear that their great master has fallen, will feel that they individually have lost a friend. He had the faculty, which is rare as it is exquisite, of interesting the young, and winning their affections. I have often seen him surrounded by a group, — the ancient Romans would have aptly called it a *corona* of youths, — all intent upon his earnest conversation, and freely interrogating him on any matters of doubt. In his lectures, and other forms of instruction, he was prodigal of explanation and illustration; his manner, according to the classical image of Zeno, was like the open palm, never like the closed hand. His learning was always overflowing as from the horn of abundance. He was earnest and unrelaxing in his efforts, patient and gentle, while he listened with inspiring attention to all that the pupil said. Like Chaucer's Clerk,

"And gladly wolde he lerne, and gladly teche."

Above all, he was a living example of a love for the law, — supposed by many to be unlovable and repulsive — which seemed to burn brighter under the snows of advancing years; and such an example could not fail to touch with magnetic power the hearts of the young. Nor should I forget the lofty standard of professional morals, which he inculcated, filling his discourse with the charm of goodness. Under such auspices, and those of his learned associate, Professor Greenleaf, large classes of students of law, larger than any in England or America, have been annually gathered in Cambridge. The Law School is the golden mistletoe ingrafted on the ancient oak of the university;

Talis erat species auri frondentis opaca
Ilice.

The deceased was proud of his character as a professor. In his earlier works he is called on the title page, "Dane professor of law." It was only on the suggestion of the English publisher, that he was prevailed upon to append the other title, "Justice of the supreme court of the United States." He looked forward with peculiar delight to the time, which seemed at hand, when he should lay down the honors and cares of the bench, and devote himself singly to the duties of his chair.

I have merely glanced at his character in his three different relations to jurisprudence. Great in each of these, it is on this unprecedented combination that his peculiar fame will be reared, as upon an immortal tripod. In what I have written, I do not think that I am biased by the partialities of private friendship. I have endeavored to regard him, as posterity will regard him, as all must regard him now, who know him only in his various works. Imagine for one moment the irreparable loss, if all that he has done were blotted

out forever. When I think of the incalculable facilities which are afforded by his labors, I cannot but say with Racine, when speaking of Descartes : *Nous courons ; mais, sans lui, nous ne marcherions pas.* Besides, it is he who has inspired in many foreign bosoms, reluctant to perceive aught that is good in our country, a sincere homage to the American name. He has turned the stream of the law refluent upon the ancient fountains of Westminster Hall, and, stranger still, he has forced the waters above their sources, up the unaccustomed heights of countries, alien to the common law. It is he also who has directed, from the copious well-springs of the Roman law, and from the fresher fountains of the modern continental law, a pure and grateful stream, to enrich and fertilize our domestic jurisprudence. In his judgments, in his books, and in his teachings on all occasions, he sought to illustrate the doctrines of the common law by the lights of kindred systems.

The mind naturally seeks to compare him with other great jurists, servants of Themis, who share with him the wide spaces of fame. In genius for the law, in the exceeding usefulness of his career, in the blended character of judge and author, he cannot yield to our great master Lord Coke ; in suavity of manner, and in silver-tongued eloquence he may compare with Lord Mansfield, while in depth, accuracy and variety of juridical learning, he surpassed him far ; if he yields to Lord Stowell in elegance of diction, he excels even his excellence in the curious exploration of the foundations of that jurisdiction which they administered in common, and in the development of those great principles of public law, whose just determination helps to preserve the peace of nations ; and even in the peculiar field illustrated by the long career of Eldon, we find him a familiar worker, with Eldon's profusion of learning, and without the perplexities of his doubts. There are many who regard the judicial character of the late Chief Justice Marshall as at an unapproachable height. I revere his name, and have ever read his judgments, which seem like " pure reason," with admiration and gratitude ; but I cannot disguise that even these noble memorials must yield in high juridical character, in learning, in acuteness, in the variety of topics which they concern, in fervor, as they are far inferior in amount, to those of our friend. There is still spared to us a renowned judge, at this moment the unquestioned living head of American jurisprudence, with no rival near the throne, whose character is pure as his fame is exalted, — Mr. Chancellor Kent, whose judgments and whose works always inspired the warmest eulogies of the departed, and whose fame as a jurist furnishes the fittest parallel to his own in the annals of our law.

It were idle, perhaps, to weave further these vain comparisons, particularly to invoke the living. But busy fancy recalls the past, and persons and scenes renew themselves in my memory. I call to mind the recent chancellor of England, the model of a clear, grave, and conscientious judge, Lord Cottenham — I call to mind the ornaments of Westminster Hall, both on the bench and at the bar, where sits Denman, in manner, in conduct, and character " every inch " the judge, where pleaded only a few short months ago the consummate lawyer Follet, whose voice is now hushed in the grave — their judgments, their arguments, I cannot forget ; but Story was a greater judge than Denman, a more consummate lawyer than Follet, a master of more various learning than Cottenham.

It has been my fortune to see or to know the chief jurists of our times, in the classical countries of jurisprudence, France and Germany. I remember well the pointed and effective manner and style of Dupin, in the delivery of one of his

masterly opinions in the highest court of France; I recall the pleasant converse of Pardessus, to whom commercial and maritime law is under a larger debt, perhaps, than to any other mind, while he descanted on his favorite theme. I wander in fancy to the gentle presence of him with flowing silver locks, who was so dear to Germany, Thibaut, the expounder of the Roman law, and the earnest and successful advocate of a just scheme for the reduction of the unwritten law to the certainty of a written text. From Heidelberg I fly to Berlin, where I listen to the grave lecture, and mingle in the social circle of Savigny, so stately in person and peculiar in countenance, whom all the continent of Europe delights to honor; but my heart and my judgment untravelled fondly turn with new love and admiration to my Cambridge teacher and friend. Jurisprudence has many arrows in her golden quiver, but where is one to compare with that which is now spent in the earth?

The fame of the jurist is enhanced by the various attainments which were superinduced upon his learning in the law. His "Miscellaneous Writings" show a thoughtful mind, imbued with elegant literature, glowing with kindly sentiments, commanding a style of rich and varied eloquence. There are many passages from these which have become the common-places of our schools. In early life he yielded to the fascinations of the poetic muse; and here the great lawyer may find companionship with Selden, who is introduced by Suckling into his "Session of Poets," as "close by the chair," with Blackstone, whose "Farewell to the Muse" shows his fondness for poetic pastures, even while his eye was directed to the heights of the law, and also with Mansfield, of whom Pope has lamented in familiar words,

"How sweet an Ovid was in Murray lost!"

I have now before me, in his own handwriting, some verses which were written in 1833, entitled, "Advice to a Young Lawyer." As they cannot fail to be read with interest, I introduce them here.

Whene'er you speak, remember every cause
Stands not on eloquence, but stands on laws —
Pregnant in matter, in expression brief,
Let every sentence stand with bold relief;
On trifling points, nor time, nor talents waste,
A sad offence to learning, and to taste;
Nor deal with pompous phrase; nor e'er suppose
Poetic flights belong to reasoning prose.
Loose declamation may deceive the crowd,
And seem more striking, as it grows more loud;
But sober sense rejects it with disdain,
As nought but empty noise, and weak, as vain.
The froth of words, the schoolboy's vain parade
Of books and cases — all his stock in trade —
The pert conceits, the cunning tricks and play
Of low attorneys, strung in long array,
The unseemly jest, the petulant reply,
That chatters on, and cares not how, nor why,
Studious, avoid — unworthy themes to scan,
They sink the Speaker and disgrace the Man.
Like the false lights, by flying shadows cast,
Scarce seen, when present, and forgot, when past.

Begin with dignity; expound with grace
Each ground of reasoning in its time and place;
Let order reign throughout — each topic touch,
Nor urge its power too little, or too much.
Give each strong thought its most attractive view,
In diction clear, and yet severely true.
And, as the arguments in splendor grow,
Let each reflect its light on all below.
When to the close arrived, make no delays,
By petty flourishes, or verbal plays,
But sum the whole in one deep, solemn strain,
Like a strong current hastening to the Main.

But the jurist, rich with the spoils of time, the exalted magistrate, the orator, the writer, all vanish when I think of the friend. Much as the world may admire his memory, all who knew him shall love it more. Who can forget his bounding step, his contagious laugh, his exhilarating voice, his beaming smile, his countenance that shone like a benediction? What pen can describe these — what artist can preserve them on canvas or in marble? He was always the friend of the young, who never tired in listening to his flowing and mellifluous discourse. Nor did they ever leave his presence without feeling a warmer glow of virtue, a more inspiring love of knowledge and truth, more generous impulses of action. I first knew him while I was in college, and remember freshly, as if the words were of yesterday, the eloquence and animation, with which, at that time, in a youthful circle, he enforced the beautiful truth, that no man stands in the way of another. The world is wide enough for all, he said, and no success, which may crown our neighbor, can affect our own career. It was in this spirit that he run his race on earth, without jealousy, without envy; nay more, overflowing with appreciation and praise of labors which compare humbly with his own. In conversation, he dwelt with warmth upon all the topics, which interest man; not only upon law, but upon literature, upon history, upon the characters of men, upon the affairs of every day; above all, upon the great duties of life, the relations of men to each other, to their country, to God. High in his mind, above all human opinions and practices, were the everlasting rules of *Right;* nor did he ever rise to a truer eloquence, than when condemning, as I have more than once heard him recently, that evil sentiment, — "Our country, *be she right or wrong*," — which, in whatsoever form of language it may disguise itself, assails the very foundations of justice and virtue.

He has been happy in his life; happy also in his death. It was his hope, expressed in health, that he should not be allowed to linger superfluous on the stage, nor waste under the slow progress of disease. He was always ready to meet his God. His wishes were answered. Two days before his last illness, he delivered, in court, a masterly judgment on a complicated case in equity. Since his death, another judgment in a case that had been argued before him, has been found among his papers, ready to be pronounced.

I saw him for a single moment on the evening preceding his illness. It was an accidental meeting away from his own house — the last time that the open air of heaven fanned his cheeks. His words of familiar, household greeting, on that occasion, still linger in my ears, like an enchanted melody. The morning sun saw him on the bed from which he never rose again. Thus closed, after an illness of eight days, in the bosom of his family, without pain, surrounded by friends, a life, which, through various vicissitudes of disease, had been spared beyond the grand climacteric, that Cape of Storms in the sea of human existence:

Multis ille bonis flebilis occidit,
Nulli flebilior quam mihi.

He is gone, and we shall see him no more on earth, except in his works, and in the memory of his virtues. The scales of justice, which he had held so long, have fallen from his hands. The untiring pen of the author rests at last. The voice of the teacher is mute. The fountain which was ever flowing and ever full, is now stopped. The lips, on which the bees of Hybla might have rested, have ceased to distil the honeyed sweets of kindness. The body, warm with all the affections of life, with love for family and friends, for truth and virtue, is now cold in death. The justice of nations is eclipsed ; the life of the law is suspended. But let us listen to the words, which, though dead, he utters from the grave : " Sorrow not as those without hope." The righteous judge, the wise teacher, the faithful friend, the loving father, has ascended to his judge, his teacher, his friend, his father in Heaven.

The death of few men has made a more profound impression than that of Judge Story. In the various courts, far and near, it has been announced with deep feeling and with proper marks of respect to the deceased. An impressive eulogy was pronounced in Cambridge, at the request of the college faculty and the law students, by Professor Greenleaf. On this occasion, it is worthy of remark, the shops in town were closed. The trustees of the cemetery at Mount Auburn, deeply affected by the event which had taken from them their presiding head, and from society one of its most beloved and distinguished ornaments, and anxious that some suitable memorial should be placed, in remembrance of his worth, upon a spot which was beloved and frequented by him in life, and to the improvement of which he devoted much of his time and ardent interest, voted, that the trustees offer to the friends and fellow-citizens of the deceased, a place in the new chapel now in the progress of erection at Mount Auburn, for the reception of a marble statue of the late Joseph Story, when such a work, worthy of the character of its original shall have been completed, through the contributions of the public. The proceedings of the Boston Bar we insert at length.

A full meeting of the members of the bar of this county, was held in the United States court room, on September 12th, at ten o'clock ; having been called together upon the occasion of the death of Mr. Justice Story. George T. Bigelow, secretary of the Suffolk Bar, called the meeting to order. Chief Justice Shaw was called to the chair, and Mr. Bigelow was chosen secretary.

The chief justice, on taking the chair, said that the countenances of all present indicated too clearly their sense of the loss which the community had sustained to render any further announcement necessary from him. He would simply state that the meeting had been called on the occasion of the death of the Hon. Joseph Story, one of the justices of the supreme court of the United States.

Mr. Webster addressed the chair in substance as follows : We have just heard

from you, sir, a confirmation of the solemn fact, which we had previously heard through other channels of intelligence, and which has drawn together the whole Suffolk bar, and all connected with the courts of this county, to testify their sense of the loss which they have sustained. It has drawn from his retirement that venerable man (Judge Davis) whom we all respect and honor, who was for thirty years the associate of the deceased upon the bench. It has called here another judge, (Judge Putnam) who has retired from a seat upon that bench on which you preside, and who was himself once the instructer in the law, of him we mourn. The members of the school, over which he lately presided, the friends with whom he was associated in public or in private life have come here to-day. One sentiment only prevails among all, a sense of profound grief. But all of him is not dead. With all our sense of the irreparable loss, we feel, that he still lives among us, in his spirit, in his recorded wisdom, and in the decisions of authority which he has pronounced. "*Vivit, enim, vivetque semper; atque etiam latius in memoria hominum, et sermone, versabitur, postquam ab oculis recessit.*"

Mr. Chief Justice — The loss is not felt alone among this bar, or in the courts of this commonwealth, but is felt in every bar and every court in the Union. It is not confined to this country, nor to this continent. He had a wider range of reputation. In the high court of parliament, in every court in Westminster hall, in every distinguished judicature in Europe, in the courts of Paris, of Berlin, of Stockholm and of St. Petersburg, in the universities of Germany, Italy, and Spain, his authority was received, and all, when they hear of his death, will agree, that a great luminary has fallen. He has in some measure repaid the debt which America owes to England, and the mother can receive from the daughter, without humiliation, and without envy, the reversed hereditary transmission from the child to the parent. By the comprehensiveness of his mind, and by his vast and varied attainments, he was most fitted to compare the codes of different nations, and comprehend them in all their ramifications.

His love of country was pure and unsullied. He regarded justice as the great interest of man, and the only foundation of civilization. On this foundation he has built his fame, and united his own name with that of his country. It was to constitutional law that much of his attention was directed, and in the elucidation of which he was preëminent. "*Ad rempublicam firmandam, et ad stabiliendas vires, et sanandum populum, omnis ejus pergebat institutio.*"

But it is unnecessary for us this day to speak in detail of his public or judicial services. That duty will remain for us to perform, and it will, no doubt, be executed in a manner worthy of the occasion. Still, in the homage that will be paid to him, there is one tribute which may well come from us. We have seen him, and known him in private life. We can bear witness to his strict uprightness and purity of character; his simplicity and unostentatious habits; the ease and affability of his intercourse; his great vivacity amidst the severest labors, the cheering and animating tone of his conversation, and his fidelity to his friends; — and some of us can testify to his large and systematic charities, not dispensed in a public manner, but gladdening the hearts of those whom he assisted in private, and distilling like the dew of heaven. His labors were subservient to this great object, judicature. "*C'est vain que l'on cherche à distinguer en lui le personne privée et le personne publique; un même esprit les anime, un même objet, les reunit l'homme, le pere de famille, le citoyen, tout est en lui consacre à la gloire du magistrat.*"

Mr. Chief Justice — One may live as a conqueror, as a king, as an exalted

magistrate, but he must die as a man. The bed of death brings every man to his pure individuality ; to the intense contemplation of that deepest of all relations, the relation between the creature and his creator. This relation, the deceased always acknowledged. He reverenced the Scriptures of Truth ; he received from them this lesson, and submitted himself, in all things, to the will of Providence. His career on earth was well sustained. To the close of his life his faculties remained unimpaired, and the lamp went out at last undimmed, without flickering, and without obscuration. His last words, which were heard by mortal ears, were a fervent supplication to his Maker, to take him to himself.

Mr. Webster then submitted the following resolutions :

Resolved, That the members of the Suffolk Bar have learned with deep regret the death of the Honorable Joseph Story, one of the justices of the supreme court of the United States, and Dane Professor of law in Harvard university.

Resolved, That we acknowledge with the liveliest gratitude, the vast debt which we and our whole country owe to his labors and services as a *judge*. He was elevated to the bench in early manhood, and his judicial life was prolonged to a period almost unexampled in the annals of the common law. The wisdom of the selection was immediately indicated, by the distinguished ability which he displayed, and each succeeding year has added to the splendor and extent of his judicial fame. He moved with familiar steps over every province and department of jurisprudence. All branches of the law have been illustrated and enlarged by his learning, acuteness, and sagacity, and of some he has been the creator. His immortal judgments contain copious stores of ripe and sound learning, which will be of inestimable value in all future times, alike to the judge, the practitioner, and the student. We, too, who have had such ample opportunities of witnessing his judicial presence, can give our emphatic tribute of admiration to the gentle dignity with which he administered the law, to his untiring industry, his firm impartiality, his uniform courtesy, and recognition of the rights of all who approached him, his quickness and tact in the despatch of business, the readiness with which he applied his vast learning, and his humanity in the treatment of those towards whom he was called upon to direct the powers and frowns of the law.

Resolved, That in regarding the deceased as an *author*, Jurisprudence mourns one of her greatest sons — one of the greatest not only among those of his own age, but in the long succession of ages, whose fame has become a familiar word in all lands, where the law is taught as a science ; whose works have been translated and commented on in several of the classical languages of the European continent ; and have been revered as authorities throughout the civilized world. It was his rare lot while yet alive, to receive, as from a distant posterity, the tribute of foreign nations to his exalted merit as a jurist.

Resolved, That we mourn his loss as a *teacher* of jurisprudence, who brought to the important duties of the professor's chair the most exuberant learning, the most unwearied patience, a native delight in the great subjects which he expounded, a copious and persuasive eloquence, and a contagious enthusiasm, which filled his pupils with love for the law, and for the master who taught it so well ; who illumined all his teachings by the loftiest morality, and never failed to show that whosoever aspired to the fame of a great lawyer must be also a good man.

Resolved, That we recall with gratitude and admiration, his character as a *man* and a member of society. We have seen and felt the daily beauty of his life. We honor his memory for his domestic virtues, his warm affections and generous temper, the purity, elevation, and simplicity of his life and conversation, and the spontaneous sympathy which gave so cordial a charm to his looks, his tones, and his greetings. The approach of age never chilled the impulses of his heart, nor deadened his interest in life. We respect, too, his activity of mind, the literary attainments which his systematic industry enabled him to acquire, and the unaffected conscientiousness which made him so ready to assume and so prompt to discharge the common duties of life.

Resolved, That the death of one so great as a judge, as an author, as a teacher, and so good as a man, is a loss which is irreparable to the bar, to the country, and to mankind.

Resolved, That a committee of twelve be appointed by the chair, to consider and determine the proper tribute of respect to the deceased, and to make the necessary arrangements for carrying the same into execution.

Resolved, That the bar tender their heartfelt sympathy to the family of the deceased, and request permission to join in the funeral ceremonies.

Resolved, That the president of this meeting be requested to communicate a copy of these resolutions to the family of the deceased; and the attorney of the United States be requested to communicate the same to the circuit court of the United States, over which the deceased has so long presided, and ask to have them entered on the records of the court.

Judge Davis then addressed the chair. It might be more discreet, he said, for him in his advanced years, to be seated among his professional friends, on this sad occasion, in silent sorrow; but there were circumstances which would excuse his attempt to accompany his approbation of the resolutions which had been offered, with some expressions prompted by the lamented death of a man so distinguished and so beloved as Judge Story. In this apartment his welcome voice was often heard, and heard with delighted attention. The winged words were words of wisdom and truth. Here then shone the "gladsome light of Jurisprudence," where now is substituted the dim light, may we not say the "dim religious light," of lamentation. Our excellent friend, who has offered the resolutions under consideration, has given us in distinct and just relief the distinguishing features in the life and character of Judge Story, which we all recognize to be as correct as they are impressive. With me there are special reasons for grateful recollections of the eminent jurist, the loss of whom we with the whole community feelingly deplore. It was my lot to be associated with him in judicial services, for nearly the whole period of his official life. It was, throughout, to me a pleasant and most instructive portion of my life; and its various incidents, the genial influence of his happy temperament, and the ready expression of his varied and extensive learning, enriched and adorned by the felicitous action of his energetic mind, have been with me habitual themes of grateful remembrance. It was said of a very distinguished man of science in Scotland Colin MacLaurin, who had done much in the field of the exact sciences, a follower of the illustrious Newton, "He was taken from us when he was capable of doing much more, but he has left an example which will long be admired and imitated, until the revolution of human affairs puts an end to learning in these parts of the world, or the fickleness of men, and their satiety of the best things, have substituted some empty form of false science, and by the one or the other means we are brought back to our original state of barbarity."

We may say the same of the various well digested, happily constructed performances of Judge Story, in the line of his profession. They are a treasure, a rich treasure for his country and of civilized man in every region — and will be gratefully admired and cherished, so long as the light and love of all good learning shall remain unextinguished.

With the mention of Colin MacLaurin, occurs the apt and instructive epitaph, written by his son on the monument which he had erected in memory of his revered father. "His son erects this monument, not to perpetuate his father's name, for it needs not such aid, but that in this vale of sorrow and solitude, mortals might receive consolation; for let them study his works, and be assured, that the capacious mind from which proceed such conceptions survives the perishing body."

The original is in Latin, in better expression than the translation which has been offered. In this assembly a quotation from that performance will not, it is presumed, be considered as improper or pedantic.

"Hunc lapidem posuit filius.
Non ut nomini paterno consulat,
Nam tali auxilio nil eget,
Sed ut in hoc infelici campo,
Ubi luctus regnat et pavor,
Mortalibus prorsus non absit solatium,
Mentemque tantarum rerum capacem
Corpori caduco superstitem crede."

The remains of Judge Story will rest at Mount Auburn, with those of his distinguished classmate, William Ellery Channing. With such thoughts let them be contemplated, as those happily applied to the memory of MacLaurin, by his affectionate son.

The resolutions which have been offered will, I trust, meet with cordial approbation, and I have only to ask leave to second the motion for their acceptance.

The resolutions were unanimously adopted; and the chair appointed, on the committee provided for by the 7th resolution, Judge Davis, Hon. Jeremiah Mason, Judge Putnam, Judge Jackson, Benjamin Rand, Judge Sprague, Charles G. Loring, Franklin Dexter, B. R. Curtis, Judge Warren, Charles Sumner, and Robert Rantoul, Jr.

Mr. Jeremiah Mason introduced the following resolution, with a few appropriate remarks:

Resolved, That Mr. Webster be requested to pronounce a discourse on the life and judicial character of the late Mr. Justice Story, at such time and place as shall be designated by the committee of the Bar.

Judge Sprague spoke briefly in favor of the resolution, and seconded the motion for its passage. It was adopted.

Mr. Charles Sumner then stated that, anticipating the passage of a resolution by the bar, requesting permission to join in the funeral ceremonies, he had ascertained from the family that the funeral was to be private, and that, while the family were grateful for the sympathy of the public bodies, with which the deceased had been associated, seeking to express itself in this way, they hoped they would not attend the funeral officially.

The meeting was then dissolved.

Recent American Decisions.

Circuit Court of the United States, Massachusetts, August, 1845, at Boston.

United States v. Peter Flowery.

Facts which, if standing alone, would be irrelevant, are admissible in evidence upon the statement of counsel that they constitute a part of a chain of evidence which, as a whole, would be relevant.

The court may direct at what part of such proposed chain of evidence the counsel shall begin.

It is no ground for a new trial, that incompetent evidence was admitted without objection.

It seems that where there is evidence tending to show that several persons are combined together in carrying on an unlawful enterprise, such as the slave trade, the conversations of some of them, in relation thereto, in the absence of others, may be given in evidence against such others.

Where a witness, in his direct examination, had testified that a certain person was reputed to be a man of large property, counsel were permitted, in cross-examination, to ask in what such property was reputed to consist.

A new trial will not be granted, merely because counsel have been indulged in too great latitude in arguing, as to the inferences to be drawn from the evidence.

Whether circuit courts of the United States may be holden by the two judges in any district, at the same time, in different rooms — *Quære.*

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by

SPRAGUE, J. Peter Flowery was indicted under the statute of 1818, for causing a vessel, called the Spitfire, to sail from the port of New Orleans, with intent to employ her in the slave trade. The jury returned a verdict of guilty, and his counsel now move for a new trial, for several causes.

The most important, and that which has been pressed with the greatest earnestness, is, that evidence was admitted that the Spitfire, on a former voyage, carried a cargo of slaves from Rio Pongo to Cuba.

This was objected to, on the ground that Flowery had no connection therewith. The district attorney thereupon stated, that he should introduce evidence that Flowery had knowledge of such former voyage. It is now insisted that such evidence was not subsequently introduced, and that the testimony objected to should not have been admitted upon the statement of the district attorney.

It is conceded to be the practice in civil cases to admit evidence under such circumstances; but it is urged that it ought to be otherwise in criminal. We know of no such distinction. The practice and the principle are the same in both. Where a chain of testimony is proposed, the links of which, unconnected, would be irrelevant, counsel must be allowed to begin somewhere, upon the expectation that the other links are to be afterwards supplied, and for this the court rely upon the statement of counsel, professional honor being a guaranty against abuse. But the

order in which such evidence shall be introduced, is under the control of the court, who may direct the counsel to begin at any part of the proposed chain of evidence, as the purposes of justice may seem to require.

It is urged that the court, after the evidence was closed, should have instructed the jury to lay this testimony out of the case.

In the first place, no such instruction was requested; and in the next, the evidence subsequently introduced justified the statement of the district attorney, upon which it was originally admitted, and rendered it proper to be submitted to the final consideration of the jury. The evidence tended to show, that the Spitfire was a schooner of about 99 tons burthen, built at Baltimore in the year 1841, and there registered, in 1842, by the name of Caballera, as the property of one Gordon; that subsequently she was in the Rio Pongo, under his command, where a bill of sale of her was made to one Peter Faber, who had a slave factory on that river, from which, under the command of Gordon, she carried a cargo of slaves to Cuba, and there landed them, and immediately Gordon delivered up the schooner to some Spaniards.

This was supposed to be about the month of May, 1843. The name of Caballera was erased from her counter, when she took on board the slaves. The next that we hear of her is in September of the same year, when she was at Havana, under the command of Flowery, by the name of the Spitfire, bound, as the shipping articles state, on a voyage to Key West, New Orleans, and back to Havana. She proceeded on this voyage with one John Scosure on board, as a passenger. On her arrival at New Orleans, she was stated, in the shipping list, to be for sale, but was carried to the opposite side of the river, where she lay for several weeks, undergoing extensive repairs; both masts were taken out, and new ones put in; she was coppered, painted, and some new sails and rigging furnished. Afterwards a bill of sale was made, purporting to be from one Falker, of Key West, by one Anquera, as his attorney at New Orleans, to Peter Flowery, in consideration of seven thousand five hundred dollars, and a charter-party between Flowery and Scosure, for a voyage from New Orleans to Havana, and thence to the Rio Pongo, for which Scosure was to pay five thousand dollars. The vessel could not be registered as American, because she had been owned by foreigners. The bill of sale and charter-party appear to have been executed at New Orleans on the 20th and 25th days of November, 1844, and she sailed from New Orleans on the 26th, for Havana, with Scosure on board as a passenger, and thence proceeded to Faber's factory, on the Rio Pongo, where she was seized.

There was testimony that she was originally constructed with eight places for sweeps, quarter houses, and a trunk on deck, extending partly over the main hold, and partly over the cabin, with holes in the sides, nine by twelve inches, for ventilation, and that in a former voyage there had been a bulk head in the hold, to divide the male from the female slaves. There was also evidence, tending to show that the name Cabellera had been painted in black letters on the taffrail, and that Flowery, while at New Orleans, caused them to be painted over, so as to conceal them.

The question is not, whether all this proves that Flowery knew of the former voyage, but whether there is anything to be submitted to a jury on that point, and in our opinion there is.

Flowery resides in New York, and formerly commanded a vessel running between that place and Havana. Not long after the termination of the first voyage, he is found in command of the Spitfire, at Havana. When, and under what circumstances, did he become connected with this vessel, owned by foreigners? Were there not indications of the business in which she had been engaged; the marks of the bulk-head in the hold, quarter houses, row-locks, and especially the trunk on deck, peculiarly adapted to the slave trade, and to no other. Again, upon her arrival at New Orleans, why were such extensive repairs made upon a vessel, then only between two and three years old. If the purpose was to change her appearance, so that she should not be recognized on her reappearance on the African coast, we see a sufficient reason for the new masts, new sails, and new paint. The importance of disguising her will be better appreciated, when it is recollected that her seizure was owing to her being recognized by Turner, who, having been mate on her former voyage, discovered her identity, notwithstanding the change she had undergone. Again, Flowery says that he became the purchaser of this vessel, at New Orleans, and gave the extraordinary price of seven thousand five hundred dollars. Would he have done this without any inquiry into her previous history; and especially, would he have taken a bill of sale, declaring that she could not have the privileges of an American vessel, because she had been owned by a foreigner, without investigation? And further still, there was evidence that he not only knew of her former name, Cabellera, but had himself caused it to be painted over and concealed. Upon the last point there was, indeed, rebutting evidence of great force, but of the effect of the whole it was the province of the jury to judge.

It is further urged by the learned counsel, that if Flowery knew

of the former voyage, it has no legitimate bearing upon the question, whether this was a slave voyage or not, and is, therefore, irrelevant.

We are to bear in mind that there were two propositions to be maintained by the government, both of which were denied by the defendant; first, that this was a slave voyage, and, second, that he had knowledge of, and intended to employ the vessel in it, when he sailed from New Orleans. One question was, whether the sale to Flowery was real or colorable. If Flowery knew that she had been engaged in the slave trade, and liable to forfeiture, would he *bona fide* have purchased her, and paid the exorbitant price of seven thousand five hundred dollars? The knowledge of the former voyage tended to show that this sale was fictitious, and in this, as well as in other respects, went to the question of scienter and intent.

The second ground upon which a new trial is asked, is the testimony of one Smith, as to a conversation at Faber's factory, between Faber and a Spaniard and a Frenchman, who went from Havana in the Spitfire. To this it is sufficient to say, that the evidence was not objected to; and although we are of opinion that the testimony as to conversations between the Spaniard, Frenchman, and Flowery, on the outward passage, and the part acted by them would, under all the circumstances in evidence in the case, have been sufficient to have authorized its introduction, if it had been resisted, we do not think it necessary to dwell upon it.

The third ground is, that the district attorney was permitted to ask in what the property of Scosure was reputed to consist.

The facts are as follow: One McLellan, a witness for the defendant, after testifying that he knew Scosure, and that he resided at Havana, was asked by the counsel for the defendant whether Scosure was a man of property? To which the witness answered that he was reputed to be a man of large property; that he was reputed to own property to the amount of three or four hundred thousand dollars. The defendant's counsel then asked him whether Scosure was reputed to own property in this country; to which the witness answered that he was, to the amount of a hundred thousand dollars.

The district attorney, in cross-examination, asked the witness in what the property of Scosure consisted; to which he replied, that he did not know. He then asked in what it was reputed to consist. This question was objected to. The court ruled that it might be put in reference to the property of which the witness, in

his direct examination, had testified that Scosure was reputed to be the owner. The district attorney then asked whether Scosure was reputed to be the owner of cargoes of vessels. The witness inquired whether he was bound to answer. The defendant's counsel objected to the question, and it was not put.

The question put by the district attorney was proper in order to test the correctness of the original statement made by the witness, and is clearly within the established principles and practice of cross-examination.

The two following grounds are, that the district attorney was permitted to argue to the jury that Scosure had been previously engaged in the slave trade, and that certain passports found on board the Spitfire, were obtained for the purpose of protecting her against seizure. The objection is merely that counsel was allowed too great latitude in arguing as to the inferences to be drawn from the evidence. If this were so we should not, for that reason alone, disturb a verdict, rendered upon ample testimony, and with which the judge who presided at the trial is entirely satisfied.

The course of argument to be allowed must rest in some degree at least upon the judicial discretion of the court. A line of argument, clearly unfounded or irrelevant, would not be permitted. But there are many cases, and especially those which are voluminous and complicated, in which it may well be presumed that counsel perceive bearings and applications of evidence which are not at once apparent to the court, and when it is made a question whether the evidence tends to a certain conclusion, the views of counsel, in other words, his argument, must be heard, before the court can be called upon to decide. This will be in the presence of the jury, and it will not generally be material whether it be in form addressed to them or to the court; but it will conduce to the convenience and despatch of business, that the argument should at once be addressed to the jury, and the court afterwards should give such instructions as they may deem proper.

But we think there was some evidence, slight perhaps, but still something before the jury, from which counsel might well be permitted to argue that Scosure had been engaged in the slave trade. But it has been urged that, if this fact were established, it would be immaterial and irrelevant. We do not think so. The defendant gave evidence that there was such a person as Scosure, possessing great wealth, in order to repel the suggestion that the charter-party was fictitious. Suppose they had been able to show that his business was a regular and legal course of trade between Havana and the Rio Pongo, would it not have been admissible, at

least on the question of the scienter and intent of Flowery? And, on the other hand, if the government could show that his business was the slave trade, between Havana and the Rio Pongo, it would be competent evidence to the same point.

As to the passports it was contended, in behalf of the defendant, that they were perfectly innocent papers, intended merely for the personal protection of the individuals. On the other hand, it was insisted that the persons named in them were not mere passengers, and that the passports were designed to conceal their true character, and prevent suspicions, if boarded by an American or English man of war, before reaching the Cape de Verds. That one of them was not a passenger, is certain; he was shipped as, and performed the duties of cabin-boy, throughout the voyage. The other two, a Spaniard and a Frenchman, performed most of the duties of mate, there being no person in the shipping-articles holding that station; they regularly stood watch, took observations, kept the run of the vessel, and marked her course; one on a French, and the other on a Spanish chart; and had books of navigation, in the French and Spanish languages, respectively. After arriving on the African coast, on seeing a British steamer, the Spaniard concealed certain papers and money, and the Frenchman, being in the boat, threw overboard a flag, appearing to be Spanish, declaring that if the English found that they would seize the vessel. On arriving in the Rio Pongo both these persons went to Faber's slave factory, lived in his house, and were heard bargaining with him for a cargo of slaves. There was testimony that these two persons and Flowery, on the outward passage, had frequent conversations, in which they spoke of the voyage as a slave voyage, and of the amount they should make if they succeeded in carrying a cargo of slaves to Cuba. All the passports were for persons going from Havana to the Cape de Verds, for which the Spitfire was cleared; yet she passed in sight of those islands, without touching.

We think this not only competent, but strong evidence, that the ostensible was not the real purpose for which those passports were obtained; that the Spaniard and Frenchman, and the Spanish cabin boy, were represented as passengers, to prevent the suspicions that might arise if they appeared to be a part of the crew of an American vessel, and that the district attorney had a right so to argue.

The last objection rests on the supposition that there were two circuit courts holden separately by the two judges, at the same time. This is a mistake. Flowery was tried at the regular term

holden by the district judge, by adjournment, in the usual manner, from day to day, in the court room. In the mean time the judge of the supreme court was, by agreement of parties, hearing a cause in another room. This was not intended to be a circuit court. No judgment or decree was passed. Had the result of the hearing called for any it might have been, by consent of parties, afterwards entered in court. Upon this statement of the facts the counsel, upon a suggestion from the bench, have forborne to press the objection, and we have no occasion to consider whether it be competent for the two judges to hold the circuit courts in different rooms at the same time, or not.[1]

Rantoul, district attorney, for the United States.
J. P. Rogers and *P. W. Chandler*, for the defendant.

Supreme Court of Vermont, Windsor County, February Term, 1845.

ELIPHALET KIMBALL *v.* CHARLES IVES, Administrator of SOPHRONIA DIX.

The statute of limitations does not apply to the account of guardian against ward, while the relation subsists; and after its termination, lapse of time will not bar the claim, when the delay is sufficiently explained by the circumstances in the case.

The question, whether a claim shall be considered as barred by mere lapse of time, is one of fact for the jury, and never a question of law merely.

A lapse of time, less than twenty years, when aided by circumstances, may be sufficient to ground such a presumption upon, and a much longer time may be explained by testimony, so as to afford no just ground of making such a presumption.

THIS was an appeal from the allowance of a guardian's account in the probate court, which was referred to a commissioner in the county court, who reported the facts in the case, upon which the county court rendered judgment for the guardian, to recover the balance of his account, to which judgment exceptions being filed,

---

[1] The prisoner, after some remarks had been made by his counsel, was sentenced to five years imprisonment in the common jail, and to pay a fine of two thousand dollars.

the case came here for revision. The important facts in the case were, that the ward's father died in 1804, she being about five years old, and her mother was appointed her guardian, and so continued until she (the mother) intermarried with the plaintiff, when he was appointed the guardian, in 1808, and so continued, until the ward came of age, in 1817. The ward was always *non compos mentis*, and continued to reside in the family of the plaintiff, and had her maintenance there until the time of her death, in 1832. The plaintiff's wife, the mother of the ward, deceased in 1839. No steps were taken to look up the property of the ward, until after the decease of her mother. The plaintiff and his family had all along resided on the land constituting the ward's mother's dower, in her former husband's estate.

The opinion of the court was delivered by

Redfield, J. Two questions are made in the present case: 1. Whether the plaintiff's account is barred by the statute of limitations. 2. Whether a settlement of the account is to be presumed from lapse of time. It has been long settled, that the statute of limitations will not, in equity, bar an account subsisting between trustee and *cestui que trust*, so long as the trust subsists, and the relation is acknowledged on both sides, which ought, perhaps, to be extended to the case of a guardian's account, as well after, as before the guardianship ceases, until the account is settled and the property surrendered, or some adverse claim, inconsistent with the former relation, is set up. *Decouche* v. *Savetier*, (3 Johns. Ch. R. 190); *Goodrich* v. *Pendleton*, (Ib. 384); *Coster* v. *Murray*, (5 Ib. 522.) It is true, indeed, that where the *law* fixes a limitation to any concurrent remedy, this will be applied in *equity;* so where the trust is denied, and the possession becomes adverse. *Kane* v. *Bloodgood*, (7 Johns. Ch. R. 90, 127); *Roosevelt* v. *Mark*, (6 Ib. 266); *Murray* v. *Coster*, (20 Johns. R. 576.)

In analogy to this principle of chancery law, it has always been held in this state, that the statute of limitations will not bar the account of an executor or administrator, or of a guardian, by parity of reasoning. *Evarts* v. *Nason's estate*, (11 Verm. R. 122); *Rix, Administrator*, v. *Heirs of Smith*, (8 Ib. 365.) In the former of these cases it was held, that mere lapse of time will not *bar* such a claim. The same reason, indeed, which should exempt such a claim from the operation of the statute of limitations, should equally exempt it from the presumptive bar, from lapse of time.

There is another reason why this presumptive bar cannot be

applied in the present case — no such question was raised until the hearing in this court. This presumptive bar is always a matter of fact, to be determined by the triers of the fact, and should have been raised and determined by the commissioner. But from the commissioner reporting the account, and referring the questions of law, arising upon the facts, to the court, we are to infer that the account is to be allowed, unless the facts reported by the commissioner constitute a peremptory bar. There are some very respectable authorities, which so treat the defence of mere lapse of time. *Sumner* v. *Child*, (2 Conn. R. 607); *Cope* v. *Humphreys*, (14 Serg. & Raw. 15); *Holcroft* v. *Heel*, (1 B. & P. 400.) Some other cases seem to favor the same views; but that has arisen, perhaps, mainly, from the fact that, in the absence of all proof to the contrary, a lapse of twenty years is considered sufficient time from which to presume a grant, or payment, or most other matters resting in presumption. And the jury, when recommended by the court so to do, will ordinarily make such presumptions, without hesitation. And there are, no doubt, many cases where these presumptions have been made, quite contrary to what was supposed to be the fact. But that has happened ordinarily, in regard to deeds and conveyances, in order to quiet a long and uninterrupted possession, which in this state requires only fifteen years. But the payment of a debt, or the settlement of an account, is never to be presumed, except in accordance with the rational probabilities of the case. It is, therefore, but just and reasonable it should be judged of by the triers of the fact. Such, too, will be found to be the settled rule of the English law. (2 Will. Saund. R. 175, *n.* 2.) *Mayor of Hull* v. *Horner*, (Cowp. R. 102.) In this last case Lord Mansfield says: "I think it was properly left to the jury, whether they would presume such a grant." In *Campbell* v. *Wilson*, (3 East R. 294,) Lord Ellenborough says: "It might be too much to say, in the case of *Holcroft* v. *Heel*, that the adverse user of the neighboring market for twenty years was a *bar* to the action by the grantee of the crown. In strictness it was not. But certainly the evidence in this case was sufficient to *warrant the jury in presuming a grant of the right of way.*" The rule is laid down in the late edition of Starkie's Evidence, vol. 2, 824, thus: "But a lapse of twenty years, before the statute, *was no legal bar*, but *merely afforded a presumption in fact for the jury.*" And this last proposition contains the result of all the English cases. The consideration, too, that a less time than twenty years, when circumstances concur to support the presumption, is permitted to go to the jury, from which to find the fact

sought, and that even a much longer time than twenty years is permitted to be explained by evidence, shows very clearly that the presumption is one of fact, and not of law. *Gray* v. *Bond*, (2 B. & B. 667.) Lord Ellenborough, in *Bealey* v. *Shaw*, (6 East, 214.) From this last case, as well as the nature of the subject, I should consider presumptions of payment and of settlement more undeniably matters of fact for the jury, than presumptive grants, which, in the absence of all evidence to the contrary, become absolute in the term of fifteen years in this state. In the present case, the lapse of time was fully explained by the facts and circumstances in the case, and no presumption of payment or settlement of the account could arise.

Judgment affirmed, and ordered to be certified to the probate court.

BENJAMIN F. ANDRUS and WIFE *v.* JONATHAN FOSTER.

Where a daughter continues to reside in the family of her father after the age of majority, the same as before, the law implies no obligation on the part of the father to pay for her services.

If she claim pay, it is incumbent upon her to show that the services were performed, under such circumstances as to justify an expectation on the part of both parent and child, that pecuniary compensation would be required.

The right to compensation for services, in such cases, depends upon the circumstances of each particular case, and must be determined by the triers of the facts.

THE opinion of the court was delivered by

REDFIELD, J. The important question in this case is, whether a child, or foster-child, remaining at the house of its parent, after the age of majority, and making that a home, the same as before, and assisting in the household labors, (the child being a daughter,) is entitled to a pecuniary compensation for her labor, the same as a stranger. We think it difficult to lay down any general rule upon the subject. Every case will be more or less affected by its own peculiar circumstances. The amount and kind of labor, the ability and necessity of the parent, the course of dealing between the parties, whether they keep accounts or not, whether the demand of compensation is made early, or is delayed for many years after the relation began, or, as in the present case, after it ter-

minated; these, and many similar circumstances, will be significant indications of the expectation of the parties, at the time of the relation subsisting, which should determine their rights. The matter is, perhaps, as well summed up by Chief Justice Shaw, in *Guild* v. *Guild*, (15 Pick. R. 129,) as it can be. "Such a continued residence of a daughter may, indeed must, be regarded under one of these three aspects: She may be a servant, or housekeeper, expecting pecuniary compensation for services; or she may be a boarder, expecting to pay pecuniary compensation for accommodations and subsistence; or she may be a visiter, expecting neither to make, nor pay compensation. Perhaps it might be safe to consider the latter predicament as embracing the larger number of cases."

This would lead us to the same conclusion to which the court came in the case of *Fitch* v. *Peckham's Executors*, (Franklin county January term, 1844,) which will appear in the forthcoming volume of reports. The rule there laid down by the chief justice is, that the law in such cases will not ordinarily imply a promise on the part of the parent to make pecuniary compensation for the child's labor; or on the part of the child to make such compensation for her board. If the child, in such circumstances, bring suit for pay, it is incumbent upon her to show, that at the time it was expected by both parties that she should receive such compensation, or that the circumstances under which the services were performed were such, that such expectation was reasonable and natural.

In fact, I apprehend the circumstances of each case will usually remove all doubt of the expectation of the parties at the time. In the present case, the plaintiff's wife had been brought up from a child by defendant. At the time she became of age defendant told her she was free to leave him, if she chose; if she remained with him, and did well, he would do well by her. This was in 1829, or 1830, and she continued to reside with defendant until 1836, and labored most of the time. "She lived in the family, as a member of it, and was uniformly treated as before she became of age." Neither party kept any account against the other; plaintiff's wife had what she needed for her support, as before, and when she left, neither party expected her to return, to reside any more with defendant. No settlement was made, and no claim for compensation made, until after the intermarriage of plaintiffs, 12th January, 1842. About the 1st of February, 1841, she returned to live with defendant, *at his request*, and worked for defendant until

about one week before her marriage. During this time the auditor estimates her services at $37 50, and reports, that defendant furnished her money and other things, such as she needed for housekeeping, to the amount of $108 14. The auditor further reports, that $30 only of this last sum was paid to go towards the last term of labor, which would leave a balance in plaintiff's favor, upon the last service, of $8 55, including interest.

In regard to the first term of service, or residence, after the plaintiff's wife became of age, it is very obvious that neither party expected she was to receive any other pecuniary compensation than what defendant's generosity might prompt him to give. But in regard to the latter, it seems different. There is nothing which would induce us to doubt, that compensation was expected. The only wonder is, that when the defendant delivered $108 during that term, he should not have first paid his debt, and left the balance to go upon the score of gratuity or generosity. Men are very likely to meet their debts first, and then discharge the more *imperfect obligations*. And it would seem that the auditor may have arbitrarily applied one certain item of $30 (money) towards the last services, upon the mere supposition that that would best meet the moral equity of the case. Be that as it may, it is his province to decide the facts; and as they stand, the plaintiffs are entitled to judgment for the sum of $8 55. From the abstract in the Law Magazine, No. 5, April, 1844, p. 166, it seems that the supreme court of Pennsylvania have recently had this subject under consideration, and have come to the same determination as here made, which, in every view of the case, seems most just and reasonable.

Judgment of the county court reversed, and judgment for the plaintiffs for $8 55.

Circuit Court of the United States, Massachusetts, August, 1845, at Boston.

FREDERICK EMERSON *v.* CHARLES DAVIES ET AL.

An author is entitled to a copyright, if the combination and arrangement of his book are new, and an improvement upon former modes of using the same materials; and it is not necessary that the materials themselves should be new, or never before used for the same purpose.

Where, in such a case, an author obtains a copyright, another person will have a

right to use the same materials, but not in the same combination and arrangement.

Copying an important and valuable portion of a work, that is the subject of a copyright, is sufficient ground for an injunction.

Under the circumstances of the case, the court ordered an issue upon the point whether there had been a violation of copyright, to be tried by a jury, if the defendants should so elect within a time specified.

This was a bill in equity, brought by the author and proprietor of the Arithmetic known as "Emerson's First Part," or "The North American Arithmetic, Part First, containing Elementary Lessons," against the defendants, as author and publisher of a work called "First Lessons in Arithmetic, designed for beginners." The plaintiff's book was first published, and the copyright secured at Boston, in 1829; and a new and improved edition was published, and the copyright thereof secured, in 1838. The defendant's book was first published at Philadelphia, in 1840. The plaintiff in his bill alleged that his book contained three original features, in each of which his copyright had been infringed by the defendants. These original features were — 1. A plan of lessons, in which a set of tables is arranged in the form of lessons, so as to present abstract and concrete examples of the same sum. 2. A gradation of examples to precede each table, so as to form with the table a symmetrical appearance of each page. 3. A method of illustration by attaching to each example what were called unit marks, representing the numbers embraced in the example. The defendants, in their answer, denied the originality of the plaintiff's book, in all of the features claimed by him, and much evidence, of several learned professors of mathematics, was taken to show the sources from which both the plaintiff and the defendants might have taken the materials and methods made use of. Some of the learned witnesses for the defendants pointedly denied all originality in the plaintiff's book, and many works of mathematics and systems of teaching, ancient and modern, were introduced to show that the materials and method of the plaintiff were not new. To these positions it was answered by the plaintiff's counsel, that the witnesses for the defendants had no accurate notion of what constitutes originality in contemplation of law, however eminent they might be as mathematicians; and that the plaintiff had so varied the use of the old materials, and so improved upon the hints and analogous methods previously existing, as to produce an original work. One important question, therefore, that arose in the case was, what constitutes originality? In the discussion of this ques-

tion, it was contended for the plaintiff, that there can be no adequate protection for the labors of literary men, unless the new form of combination or new use of old materials is as fully protected as matter purely original. It was farther denied by the defendants that there was any other similarity between their book and that of the plaintiff than such as would naturally be produced in dealing with the same subject. On the part of the plaintiff it was contended upon the evidence, that the similarity between the two books could not have been the result of accident, but must have been produced by some degree of imitation, amounting to what is technically called "literary piracy."

John Pickering and *George T. Curtis*, for the plaintiff.
Foote, of New York, and *Ivers J. Austin*, for the defendants.

Story, J., in delivering the opinion of the court, said, that the decision of the case depended upon two questions. (1.) Whether the plaintiff's book contained anything new and original, to entitle him to a copyright, and (2), If so, whether the defendant had made use of, or copied what was new and original in the plaintiff's work, and thus infringed the copyright. Upon the first point, the court entertained no doubt. It was not necessary that the materials used by the plaintiff should have been new, or never before used for the same purpose. If the combination of the materials were new, if the plan and arrangement were an improvement upon former modes of using the same materials, it was sufficient to entitle him to a copyright. He had no right to appropriate materials which were common to all, in such a way as to prevent others from using the same materials; but another person would have no right to use those materials in the same combination and arrangement. In truth, there could be few things which were strictly new and original; every one must necessarily borrow and use much that was well known and used before. His thoughts were more or less a new combination of what other men have thought and expressed. The case of *Gray* v. *Russell*, (1 Story R. 11,) was a case confessedly of a mere improvement upon an old work — Adam's Latin Grammar; yet the court held it clearly to be the subject of a copyright. In the present case, the plaintiff claimed, as his invention, the method of illustration in the aggregate; each page constituting of itself a complete lesson; and he alleged that the defendants had adopted the same plan, arrangement, tables, gradation of examples and illustrations by unit marks,

on the same page, in imitation of the plaintiff's book. It was wholly immaterial, whether each of these particulars had existed before, if they had never before been united in one combination, or in one work, and on one page, as the plaintiff had united them. The same materials were certainly open to be used by any other author, and he would be at liberty to use unit marks and gradations of examples, and tables, and illustrations of the lessons, and to place them on the same page. But he would not be at liberty to transcribe the very lessons, and pages, and examples, and illustrations of the plaintiff. It was considered as settled by the authorities that a person has as much right to a copyright for a combination of materials, as for original thoughts. In this point of view, the plaintiff's work was a real and substantial improvement, and entitled to a copyright. The learned witnesses who had denied the originality of the plaintiff's book, had testified under an entire misapprehension of the law. The court were satisfied that with respect to his system of teaching and method of illustration and combination of previously existing materials, the plaintiff's book was, in every just sense, an original work.

The second question was one of more difficulty. Had the defendant borrowed from the plaintiff's work, without exercising his own research? Had he copied from the plaintiff's book, with only such alterations or omissions as would serve to conceal the fact of borrowing? The sworn answer of the defendant denied that any part of his work was taken from the plaintiff's book. This denial, being responsive to the allegations of the bill, was to be taken as true, unless overcome by other evidence or circumstances in the case. But the defendant did not deny that he had seen the plaintiff's book. It is true, no direct interrogatory was put, tending directly to draw out the fact. But the plaintiff's book was published in 1829, and was widely circulated. The defendant's was not published until 1840. He would have been likely to have consulted the contemporary works on the same subject. From these circumstances the court was satisfied that the defendant had seen the plaintiff's book. But this is not decisive of the fact, that he borrowed from it. Some stress was laid upon the resemblance of the page to that of the plaintiff's book. It was contended that this was done by the person who stereotyped the work; but it must have been afterwards adopted by the defendant, and must be regarded as his act.

The defendant had not shown where he obtained his materials, nor denied that he had seen the plaintiff's book. Neither of the

previous works which had been produced were similar to the plaintiff's, in those particulars in which he claimed a copyright, — the plan, the arrangement of the tables, the form of the lessons, the illustration of the examples by unit marks, and the gradation of lessons. The plaintiff's book consisted of only forty-eight pages. In comparing the books of the plaintiff and defendant, in the first eighteen to twenty pages, the tables appeared to be identical. It was said there was nothing new in these tables; but that was not the question. Was not the use and arrangement of them, as a part of the plan of the plaintiff, new, — and had they not been borrowed by the defendant? In each book they stood at the bottom of the page or lesson; and were used to fix the lesson in the memory. Then the mode of illustration by progressive lessons and visible unit marks, was the same in each, and was used for precisely the same purpose. The unit marks in Davies were uniformly a star; the unit marks in Emerson were various, — trees, apples, houses, chairs, &c. But if the pages were identical in other respects, the substitution of a star for other figures would not, we presume, make them substantially different. The other principal difference was, that Davies, in the pages in Addition, omitted all the different modes of illustrating the questions by putting cases, and put the question simply thus, "One and two are how many?" while the plaintiff put the case thus, "Tell me how many trees are one and two trees?" and then came the question in the abstract, "1 and 2 are how many?" Davies, however, put divers illustrative examples, but they were placed in a subsequent page; and were not a part of the original lesson, nor put in juxtaposition.

To afford sufficient ground for an injunction, it was not necessary that there should have been an infringement or copy of the entire work. Copying an important part of a work was a sufficient ground for an injunction as to that part. It was no objection to granting an injunction, that a suppression of a part would render the remainder of the work valueless. The defendant must suffer the consequences of his own act.

The court had bestowed upon the case a great deal of reflection, and he was compelled to come to the conclusion, that the defendant, while preparing his work, had that of the plaintiff before him, and used it as a model. Bad faith was not imputed to the defendant in so doing, but if he acted in good faith, he acted under a mistake of the law. His Honor strongly inclined to the opinion, although he admitted that the case was not free from all difficulty,

that it was his duty to order an injunction as to all the book of the defendant, Davies, from the 10th to the 19th pages inclusive, and from the 25th to the 34th pages inclusive.

His only doubt had been, whether he ought not to direct an issue to try the question. If such an issue were directed, he should order it to be tried by a jury at the bar of this court, in the following form, and confined to that; the jury to find, whether the defendant, in his book, from the 10th to the 19th pages inclusive, and from the 25th to the 34th inclusive, and from the 37th to the 44th inclusive, did use the plaintiff's work as a model, and copy or imitate the plan, arrangement, mode of illustration and tables, or whether those pages were prepared without knowledge, or use of, or reference to, that of the plaintiff. If the defendant should elect such an issue, the court would grant it upon condition that they pay to the plaintiff his ordinary taxable costs to the present time, and half the expense of printing the record. No new evidence, beyond that contained in the record, and the books themselves, was to be used on the trial of such issue, except such as would bear upon the fact of the defendant's having seen the plaintiff's book before he compiled his own; and the plaintiff was to be at liberty to examine the defendant upon oath, as to this fact only.

The defendants were to elect whether they would take an issue or not, on or before the first day of September.

Circuit Court of the United States, Georgia, May, 1844, *at Savannah. In Admiralty.*

WILLIAM B. BULLOCH *v.* STEAMBOAT LAMAR.

The courts of the United States have admiralty jurisdiction of cases of collision, happening within the ebb and flow of the tide, within the body of the county, without any reference to the kind or destination of the vessel.

In cases of collision, to recover, the libellant must prove, not only negligence upon the part of the respondent, but ordinary care on his own part.

An order to put a steamboat under headway, under her usual press of steam, just as she is entering a narrower channel, at night, when it is difficult to distinguish objects, amounts to gross neglect.

Proof that the canoe which was run down was a safe, well built boat, not over loaded, manned by a person able to manage her, and in a condition to do so, and that when she was run under she was in her proper channel, is sufficient proof of ordinary care.

The neglect of the master or owner of a steamboat, between sunset and sunrise, to carry one or more signal lights, in the manner required by the act of congress, throws on the owner the burden of proof, to show that collisions which may occur, under such circumstances, are not owing to such neglect.

Digest of American Cases.

Selections from 6 Metcalf's (Massachusetts) Reports. (Continued from p. 234.)

EVIDENCE.

The certificate of the officers of a manufacturing company, prescribed by the Rev. Sts. *c.* 38, § 17, stating the amount of the capital fixed and paid in, sworn to and recorded, within thirty days, in the registry of deeds, is conclusive evidence, for the stockholders, of the facts therein stated, so far as to exempt them from personal liability for the subsequent debts of the company. *Stedman* v. *Eveleth*, 114.

2. When a deponent, who testifies to the presentment of a bill of exchange to the acceptor, and a demand on him for payment, annexes to his deposition a copy of the bill thus presented, the deposition is competent evidence, in an action by the indorsee against the drawer, of the presentment and demand of such bill, and will be conclusive, unless the drawer shows a different bill of the same tenor. *Sabine* v. *Strong*, 270.

3. Evidence of a general usage, not of any particular place, trade, class of dealers, or course of dealing, cannot be received for the purpose of controlling a rule of law. *Strong* v. *Bliss*, 393.

4. Where an insurance company passed a vote, fixing the salary of its president at a certain sum per annum, and another president was afterwards elected, who claimed the salary fixed by that vote, it was *held*, that if the subsequent election of a president amounted to *primâ facie* evidence of an agreement to pay him such salary, yet that the presumption might be rebutted by proof that such was not the intention and understanding of the parties; and that, for the purpose of rebutting such presumption, evidence was admissible from the company's records, showing that when he was elected president, the active business of the company had been brought to a close, and that the services of the president, for which the salary was originally voted, had almost entirely terminated, and that the purpose of electing a president was to keep up a corporate organization, in order to bring the business to a close. *Held further*, that the admissions of the president, that he was not to receive any compensation, where competent evidence to show, that when he was elected, it was understood by the parties that he was not to receive the salary fixed by the vote. *Commonwealth Ins. Co.* v. *Crane*, 64.

5. Where an officer sells attached goods on mesne process, pursuant to the Rev. Sts. *c.* 90, § 57, and after the suit on which they were attached is dismissed, the defendant in that suit brings an action against the officer to recover the proceeds of the goods, the officer may defend by showing that the goods were the property of a third person, who has recovered or demanded satisfaction of him for seizing them; but the burden of proof, to support such defence, is on the officer. *Mansfield* v. *Sumner*, 94.

6. Where a witness testifies, in an action of slander, that the defendant charged the plaintiff with a certain offence, the defendant cannot be permitted to prove by the witness, that he (the witness) had before told the defendant that the plaintiff was guilty of that offence. *Clark* v. *Munsell*, 373.

7. Where a person is offered as a witness to prove the testimony of a deceased witness on a former trial of the same cause, he cannot be permitted to testify, if he state that he can give only the substance of such testimony, but not the language of the witness. Hub-

bard, J., dissenting. *Warren* v. *Nichols*, 261.

8. Where a witness, on cross-examination, stated what he understood to be the meaning of a certain written contract, made jointly by himself and another with a third person, it was held that the party who cross-examined him, could not be permitted to give evidence that, when such contract was made, all the parties thereto understood it to have a meaning different from that stated by the witness. *Brockett* v. *Bartholomew*, 396.

FOREIGN CORPORATION.

A corporation established by the laws of a foreign country may maintain an action in this commonwealth. *British American Land Co.* v. *Ames*, 391.

FRAUDS, STATUTE OF.

Where part of the consideration of a deed, which conveys real estate, is the grantee's oral promise to support the grantor during life, and to give back to him a lease of the granted premises for life, and the grantee afterwards refuses to execute such lease, the grantor cannot maintain an action against the grantee to recover damages for such refusal: such action being within the statute of frauds — Rev. Sts. *c.* 74, § 1. *Townsend* v. *Townsend*, 319.

2. The Rev. Sts. *c.* 74, § 3, which forbid the bringing of an action to charge a party on his representation concerning the character, &c. of another person, unless such representation be made in writing, apply, like the repealed St. of 1834, *c.* 182, § 5, only to representations affecting the credit of another person. *Medbury* v. *Watson*, 246.

GUARANTY.

A. subscribed this instrument: "I guaranty the payment of all sums which B. may owe C. for goods which he may sell B. *provided* that the whole amount, which B. shall owe C. at any one time, shall not exceed $1100; it being the understanding that I am, in no event, to be liable for more than that sum: And if B. shall fail punctually to pay said C. any sum which may become due to him, I am to have 90 days, after demand in writing is made on me under this guaranty, to pay the amount for which he may be so in default: And this guaranty is *upon the condition* that said C. shall, once in every eight months, from the date hereof, give me notice, in writing, of said B.'s account with him." A. afterwards signed another instrument in these terms: "Whereas C. has, at my request, consented to sell goods to B. on six months' credit, I guaranty to him the payment of $900, in addition to my obligation to him of $1100; it being the understanding that I am, in no event, to be liable for more than $2000 in all; *upon the same conditions* as expressed in my former obligation." *Held*, that the proviso in the first instrument, that the sum which B. should owe C. at any one time, should not exceed $1100, was not a condition upon the breach of which A.'s obligation was defeated; but only a limitation of A.'s liability to C.; and that if it were such a condition, yet that it was waived by the second instrument. *Curtis* v. *Hubbard*, 186.

2. Where, after such laches of the holder of a guarantied note as deprived him of any legal claims on the guaranty, the guarantor, on demand of the holder, paid him the interest due on the notes, knowing and protesting that he was not liable on his guaranty; it was *held* that he had waived the holder's laches, and continued to be liable to him on the guaranty. *Held also*, that the holder's threat to sue the guarantor for other large debts which he owed the holder, unless he would pay such interest, did not avoid the effect of that payment. *Sigourney* v. *Wetherell*, 553.

3. The holder of a guarantied note does not discharge the guarantor by taking collateral security of the maker, without giving him time. *Ib.*

HUSBAND AND WIFE.

Though the assignee of an insolvent husband, under *St.* 1838, *c.* 163, is bound to take into possession and collect the wife's choses in action, although the husband has not reduced them to possession; yet, while the assignee is proceeding to reduce such choses in action to possession, or after he has obtained payment thereof, and before distribution is made of the debtor's estate, the wife may apply to the court, by bill or petition, for a suitable provision to be made for her, out of the proceeds of such choses in action, and the court will make such provision according to the

circumstances of the case. *Davis* v. *Newton*, 537.

INDICTMENT.

The signature of the foreman of the grand jury to an indictment, certifying it to be a true bill, legally imports that it was found by twelve or more grand jurors. *Turns* v. *Commonwealth*, 224.

2. An indictment for manslaughter alleged that T., on the 25th of September, at Groton, in the county of Middlesex, "in and upon one L., then and there being, feloniously and wilfully did make an assault, and *with* a stone, which said T. then and there had and held, in and upon the head of said L., then and there feloniously and wilfully did cast and throw, and with the said stone, so as aforesaid cast and thrown, the aforesaid L. then and there feloniously and wilfully did strike, penetrate and wound, *giving* to the said L., by the casting and throwing of the stone aforesaid, in and upon the head of said L., a mortal wound," &c. *Held*, that it was sufficiently averred that T. gave L. a mortal wound, on the 25th of September, at Groton. *Ib.*

3. The 20th section of *c.* 126 of the Rev. Sts., prescribing the punishment of "every person who shall buy, receive, or aid in the concealment of any stolen goods, knowing the same to have been stolen," describes only one offence, which may be committed either by buying, receiving, or aiding in the concealment of such goods; and an indictment which charges a defendant with receiving, and aiding in the concealment, of such goods, charges only one offence. *Stevens* v. *Commonwealth*, 241.

4. An indictment which alleges that P. M., on a certain day, and at a certain place, "did commit the crime of adultery with one M. S., by then and there having carnal knowledge of the body of said S., she, the said S., then and there being a married woman, and having a husband alive," is not sufficient to support a conviction. These allegations do not show, with certainty, that M. S. was not the wife of P. M. *Moore* v. *Commonwealth*, 243.

5. In an indictment on *St.* 1839, *c.* 31, which prescribes the punishment for breaking and entering, in the night time, a shop adjoining to a dwelling-house, "with intent to commit the crime of larceny," it is not necessary to aver the intent in the words of the statute: It is sufficient to aver that the defendant broke and entered the shop with intent to steal, take and carry away the goods and chattels of A., then and there in the shop being found. *Josslyn* v. *Commonwealth*, 236.

INSOLVENT DEBTORS.

Under the insolvent act, (*St.* 1838, *c.* 193,) if a surplus remains in the hands of the assignees, after the payment of all debts proved as the statute requires, they are to pay interest on such debts, as follows: On all debts where interest is reserved by the contract, interest is to be paid according to the contract: on all debts where interest is not reserved by the contract, if the debts became due before the first publication of the warrant to the messenger, interest is to be paid from the time of such publication; but if the debts became due after such publication, interest is to be paid from the maturity of the debt; and if the debts were payable on demand, then interest is to be paid from the time of the earliest demand shown; and if no special demand be shown, then interest is to be paid from the time of such first publication. And when an appeal is taken from an order of a master, directing interest to be so paid, and that order is confirmed, the interest is to be paid up to the time of the final order of the appellate court. *Brown* v. *Lamb*, 203.

2. Where A. signs a note with B., as his surety, and B. afterwards executes a mortgage to the payee for securing payment of the note, and A. becomes insolvent, the payee cannot prove his whole debt against A., under *St.* 1838, *c.* 163, but must deduct the value of the mortgage, and be admitted as a creditor for the residue of the debt, in the manner prescribed, by § 3 of that statute, for creditors who have a mortgage or pledge of the property of "the debtor." *Lanckton* v. *Wolcot*, 305.

3. If a person, to whom an insolvent debtor is heir, dies before the first publication of the notice of the issuing of the warrant, under *St.* 1838, c. 163, to take possession of such debtor's estate, though after his petition for the benefit of the statute, the distributive share of the debtor in the deceased's estate passes

to the debtor's assignee, who is bound to claim it for the use of creditors: And it is no excuse for the assignee's neglect to claim and receive such share, that he may be obliged to give bond to refund the whole or part thereof to the deceased administrator, on certain contingencies. *Davis* v. *Newton*, 537.

4. It is the right and the duty of the assignee of an insolvent debtor, under *St.* 1838, *c.* 163, to possess himself of the choses in action of the debtor's wife, for the benefit of his creditors, although the debtor has never reduced them to possession. *Ib.*

5. A judge of probate, after receiving and hearing a petition of a creditor for a warrant against an insolvent debtor, pursuant to *St.* 1838, *c.* 163, § 19, refused to issue such warrant, because "it did not satisfactorily appear that there was, nor that there was not, one hundred dollars due" from the debtor to the petitioner. *Held*, that this was an adjudication that it did not appear to the satisfaction of the judge, that such sum was due from the alleged debtor to the petitioner. *Randall* v. *Barton*, 518.

6. The *St.* of 1838, *c.* 163, does not require that a judge of probate should make a record of his proceedings, on a petition for a warrant against a debtor, where the petition is not sustained. His duty is performed by filing the petition. *Ib.*

INSTRUMENTS FOR COINING.

Under the Rev. Sts. *c.* 127, § 18, providing for the punishment of a person who shall knowingly have in his possession any instrument, adapted and designed for coining or making counterfeit coin, with intent to use the same, or cause or permit the same to be used, in coining or making such coin, a person is punishable for so having in his possession, with such intent, an instrument adapted and designed to make one side only of a counterfeit coin. *Commonwealth* v. *Kent*, 221.

LEGACY.

When a legacy is given to a widow in lieu of dower, she takes as a purchaser for a valuable consideration, and is entitled to be paid in preference to legatees who are mere volunteers. *Hubbard* v. *Hubbard*, 50.

LIMITATIONS, STATUTE OF.

A note given by a guarantor, in payment of the interest due on the guarantied note, takes the debt out of the operation of the statute of limitations. *Sigourney* v. *Wetherell*, 553.

MANUFACTURING CORPORATION.

By the Rev. Sts. *c.* 38, § 34, where a person holds stock in a manufacturing company, as trustee, and also holds other property on the same trust, such other property may be taken for the debts of such company, if the stockholders of the company are liable to pay its debts, or any part thereof. *Stedman* v. *Eveleth*, 114.

2. Though a creditor, who has two or more demands against a manufacturing company, one only of which the stockholders are liable to pay, recovers a single judgment on all the demands, yet he may levy his execution on the personal property of a stockholder, to the amount of the demand which the stockholders are liable to pay. *Ib.*

MORTGAGE.

A. conveyed several tracts of land to B., by an absolute deed, and B. at the same time gave a bond to A. conditioned to reconvey the lands to him, on his paying B. certain sums due to him from A., and saving him harmless from certain liabilities assumed by him for A.: The value of each tract of land was estimated in the condition of the bond, and it was also therein provided that A. should remain in possession of the lands, and receive the rents and profits, so long as he should save B. harmless, &c. It was also provided, in the condition of the bond, that B., if he should be obliged to meet and discharge the liabilities incurred by him for A., might take possession of such portion of said lands, according to such estimated value, as should be equal to the debt or liability so discharged by B.: B. was obliged to pay a certain sum for A., and thereupon brought a writ of entry, in this court, to recover certain parcels of said lands, equal in value, according to said estimate, to the sum thus paid by him. *Held*, that the deed and bond constituted a mortgage, and that as the writ of entry was to foreclose a mortgage, this court had no jurisdiction of the case. *Waters* v. *Randall*, 479.

NUISANCE.

Where a mill owner, who has a grant of a right to flow certain lands, suffers his mill and dam to go to decay, and ceases to flow the land, and a highway is then made across the land, he cannot, by afterwards granting his mill privilege and right to flow, authorize his grantee to overflow such highway by means of a new mill dam on the side of the old one; and his grantee, if he so overflow the highway, is punishable for a nuisance. *Commonwealth* v. *Fisher*, 433.

OUSTER.

Where one of two tenants in common of land conveyed the whole estate to A. by a deed with warranty, and A. entered, claiming title to the whole, and, on being requested by the cotenant to give up a moiety thereof, refused so to do, and declared that he would stand a lawsuit before he would give it up; it was held that there was an ouster of the cotenant, which entitled him to maintain a writ of entry against A. *Marcy* v. *Marcy*, 360.

PARISH.

The provisions of the Rev. Sts. *c.* 20, §§ 26–28, as well as the provisions of § 17, apply to a parish that has once been legally organized, but which, for the want of officers, or any other cause, is unable to assemble in the usual manner. Therefore, where a meeting of such parish, whose assessors had not been sworn, was called and conducted in the manner prescribed by §§ 26–28, and a parish committee was chosen at such meeting, it was *held* that they were the legal committee, and that another committee, afterwards chosen at a meeting called according to the provisions of § 17, had no legal authority. *Wood* v. *Cushing*, 448.

PARTNERSHIP.

By an agreement between A. and B., A. was to supply B. with stock to be manufactured into cloth, at his mill, on A.'s account, and B. was to manufacture the stock into cloth, and to deliver the cloth to A, for a certain sum per yard: A. also engaged, that if B. should fulfil his said agreement to manufacture and deliver the cloth, A. would pay him one third part of the net profits of the business. *Held*, that this agreement did not make A. and B. partners, either between themselves, or as to third persons. *Denny* v. *Cabot*, 82.

PAUPERS.

Before the passing of *St.* 1793, *c.* 34, a citizen who dwelt and had his home in an unincorporated place, when it was incorporated into a district or town, gained a legal settlement in the district or town, by force of the act of incorporation; that statute having merely affirmed, in this particular, a preëxisting rule of law. *Inhabitants of Sutton* v. *Inhabitants of Orange*, 484.

2. Where parts of different towns, together with unincorporated territory, are incorporated into a district, a citizen dwelling and having his home in such unincorporated territory, gains a legal settlement in such district, by force of the act of incorporation, in the same manner as if such district had been wholly composed of territory previously unincorporated. *Ib.*

PLEADING.

Parties.

Where two or more are deceived and injured, in the purchase of real estate for partnership purposes, by the false and fraudulent affirmations of a third person, which are actionable, they may join in an action against him to recover damages for the deceit and injury. *Medbury* v. *Watson*, 246.

Declaration.

2. In an action by A. against B., the declaration alleged that B., intending to deceive and defraud A., falsely and fraudulently affirmed to A., who desired to purchase a tannery, that he (B.) well knew such a tannery as A. wanted, which was worth $ 4000; that the owner paid that sum for it, and would sell it for what it cost him; that he (B.) would aid A. in buying it for that sum; and that A., confiding in said affirmations, and not knowing the contrary, nor the value of the tannery, purchased the same of the owner, and paid him $ 4000 therefor; but that said tannery was not worth $ 4000, and that the former owner paid only $ 3000 for it, which was more than it was worth when A. so bought it of him; all which B. well knew, when he made said false

and fraudulent affirmations; whereby A. was deceived and greatly injured. *Held*, after verdict, that this declaration set forth facts sufficient to maintain the action, and to let in proof of other facts, showing the fraudulent design of B. to injure A. *Medbury* v. *Watson*, 246.

3. The following declaration was held to be sufficient, after verdict: For that the defendants, on, &c., at the meeting of the voters of the town of D. for the election of president and vice president of the United States, governor and lieutenant governor of this commonwealth, &c. &c., did, as selectmen of said town, presiding over said election, though the plaintiff, before offering his vote, furnished the defendants with sufficient evidence of his having the legal qualifications of a voter at said meeting, and requested them to insert his name on their list of voters, and though, at their meeting previous to the election, required by statute, to receive evidence of the qualifications of persons claiming a right to vote, the plaintiff had furnished the defendants with the evidence of his qualifications, refuse to insert the plaintiff's name on their voters' list, and did refuse to allow him to vote; whereby the plaintiff has been greatly injured, &c. *Smith* v. *Cleaveland*, 332.

4. A. subscribed this instrument: "I guaranty the payment of all sums which B. may owe C. for goods which he may sell B., *provided* that the whole amount, which B. shall owe C. at any one time, shall not exceed $1100; it being the understanding, that I am, in no event, to be liable for more than that sum: And if B. shall fail punctually to pay said C. any sum which may become due to him, I am to have 90 days, after demand in writing is made on me under this guaranty, to pay the amount for which he may be so in default: And this guaranty is *upon the condition* that said C. shall, once in every eight months from the date hereof, give me notice, in writing, of said B.'s account with him." A. afterwards signed another instrument in these terms: "Whereas C. has, at my request, consented to sell goods to B., on six months' credit, I guaranty to him the payment of $900, in addition to my obligation to him of $1100; it being the understanding, that I am, in no event, to be liable for more $2000 in all; *upon the same conditions* as expressed in my former obligations." *Held*, that in an action by C. against A. to recover the price of goods sold to B. on credit, after the making of said second instrument, it was not sufficient to aver in the declaration, (after making all other necessary allegations,) that more than 90 days before action brought, C. gave notice to A. "of said B.'s indebtedness" in a certain sum, and then made a written demand on A. for payment of said sum; that said last averment was not equivalent to an averment that, at the time of such notice to A., such sum was due and payable, or that B. was in default; and that the declaration was therefore bad, on general demurrer. *Curtis* v. *Hubbard*, 186.

In Error.

5. As there is no general issue for the trial of questions of fact upon a writ of error, it seems that the court, since special pleading is abolished, may direct how an issue may be framed, and may allow the defendant in error to plead that the judgment, which is sought to be reversed, is not erroneous in any matter of fact, and tender an issue to the country, and may require him to file, with such plea, a specification, setting forth a release of errors, an estoppel, or any matter of fact in avoidance, on which he relies to show that the judgment ought not to be reversed. *Goodridge* v. *Ross*, 487.

PRINCIPAL AND AGENT.

An agent is liable to his principal for injuries that are caused by want of reasonable skill and ordinary diligence in the exercise of his agency, but not for injuries that are caused by his mistake in a doubtful matter of law. *Mechanics Bank* v. *Merchants Bank*, 13.

PROMISSORY NOTE.

A promissory note, given by the maker in exchange for a note given to him by the payee, is on a valid consideration. *Higginson* v. *Gray*, 212.

2. Under the Rev. Sts. *c.* 33, § 5, grace is to be allowed on post notes issued by a bank, and made payable at a day certain, "with interest until due, and no interest after," though the bank insert a memorandum on the margin of the note, that it is "due" on such

day. *Mechanics Bank* v. *Merchants Bank*, 13.

3. No usage, nor any agreement, tacit or express, of the parties to a promissory note, as to presentment, demand and notice, will accelerate the time of payment, and bind the maker to pay it at an earlier day than that which is fixed by the law that applies to the note. *Ib.*

4. Where the indorser of a note is discharged by want of due demand on the maker, or of notice of the default of the maker, the legal presumption is, that he will avail himself of such discharge; and the holder, therefore, is not bound to prosecute a fruitless suit against the indorser before he can maintain an action against his own agent for neglecting to make due demand on the maker, or to give due notice of his default. *Ib.*

5. A. mortgaged goods to B., but remained in possession, and sold them to C., agreeing to give C. a bill of sale thereof, signed by B.: C. gave A. a note for the goods, payable to him or bearer, on demand, which note A. delivered to B., two days after its date; whereupon B. signed a bill of the goods, as sold to C., and allowed A. the amount thereof, in account: A., pretending that he had possession of the note, applied to C. for payment thereof, and C., not knowing that it had been delivered to B., sent the amount thereof to A. in three different sums, on different days. *Held*, in a suit on the note, brought by B. against C., that B. could not recover; the case being within the *St.* of 1839, *c.* 121, § 1, that "in any action, brought upon a promissory note payable on demand, by an indorsee against the promissor, any matter shall be deemed a legal defence, which would be a legal defence to a suit on the same note, if brought by the promisee." *Brooks* v. *Twitchell*, 513.

6. An inhabitant of Boston indorsed a promissory note, that was made payable at a bank in the city of New York, and which the maker failed to pay at maturity: When the note fell due, the indorser was at Washington, attending to his duties, at a session of congress, as a senator from Massachusetts; and he had, at all times, an agent in Boston, who had charge of his business in his absence; but the holder of the note had no notice that the indorser had such agent, nor did the indorser request that notice should be sent to him at Boston: Notice of non-payment by the maker was seasonably put into the post office at New York, directed to the indorser at Washington, where letters, addressed by mail to members of the senate, during the session of congress, are taken from the post office, by officers of the senate charged with that duty, and delivered to the members in their places, when the senate is actually in session, and on other days are delivered, by those officers, at the members' lodgings. *Held*, that the notice was sufficient to charge the indorser. *Chouteau* v. *Webster*, 1.

7. Where the maker of a promissory note abandons his business and residence, and removes into another state, before the maturity of the note, the holder, if it be not proved that he received the note after the maker's removal, is not bound, in order to charge the indorser, to demand payment of the maker in the state to which he has removed; but he is bound to demand payment at the maker's last residence or place of business within the state where he made the note, if he can find it by the use of due diligence. *Wheeler* v. *Field*, 290.

8. On the last day of grace, on a note that was dated at New York, where the maker resided when the note was made, a notary public took the note to the office of F., the third indorser, to inquire for the maker and other indorsers, and was told that F. was out, but that one H., whose office was near that of F., might give him information; whereupon the notary went to H.'s office; but the person who had the charge thereof knew nothing of the maker or first two indorsers: The notary then protested the note, without making any further inquiry for the maker. *Held*, in a suit by the holder against the third indorser, that due diligence had not been used to find the maker's last place of business or residence in New York, and that the indorser was discharged. *Ib.*

9. When there is no dispute as to the facts, the court is to determine what is due diligence in seeking for the last place of business or residence of the maker of a note. *Ib.*

10. When a note, made payable at a bank, is not at the bank when it falls due, and no demand is then made on the maker, the indorsee cannot charge the indorser by giving him seasonable notice of non-payment, although the maker had previously told the indorsee that it would be useless to send the note to the bank, because he could not pay it. *Lee Bank* v. *Spencer*, 308.

11. Where an indorsed note, left in a bank for collection, is not paid by the maker at maturity, the cashier of the bank, not knowing the place of the indorser's residence, does not use due diligence to ascertain it, by merely inquiring therefor of a person having temporary charge of the post office in the town where the bank is established; and therefore, if due notice of non-payment is not given to the indorser, he is discharged. *Phipps* v. *Chase*, 491.

12. Where a witness attests the signature of one maker of a promissory note, and another maker afterwards signs it, it seems that it is not an attested note, as to the latter, within the provision of the statute of limitations — *St.* 1786, *c.* 52, § 5. *Walker* v. *Warfield*, 466.

REPLEVIN.

In an action of replevin, the general issue pleaded, with notice, pursuant to *St.* 1836, *c.* 273, of the matter intended to be given in evidence by the defendant, is equivalent to an avowry, or plea of property in another, at common law, with a suggestion for a return; and judgment for a return may be awarded, if the defendant prevails. *Hoffman* v. *Noble*, 68.

2. T., a broker, in behalf of A., agreed with B., a commission merchant, to consign to him certain goods of A. for sale, of part of which goods a bill of lading had been received and was delivered to B.; and B. advanced a certain sum against said consignment, and agreed to sell the goods on commission: As the goods had not arrived, T., for himself, pledged to B. an accepted draft, as collateral security for the money advanced by him, to be held by B. until the goods should be received by him; and it was agreed that if the goods, on arrival, should not be satisfactory to B., T. should be at liberty to pay the sum advanced by B., and to take back the draft and goods, and that he would do so, on B.'s request. That part of the goods, which were described in said bill of lading, afterwards arrived, and came into B.'s hands, and they were taken from B. on a writ of replevin sued out by H., who claimed them on the ground that they had been fraudulently obtained from him by A.: Afterwards, and before the action of replevin was tried, B. received the sum advanced by him out of the proceeds of the draft pledged by T., and from other sources; and on the trial of said action, B. prevailed. *Held*, that B. was entitled to judgment for a return of the goods. *Ib.*

REVIEW.

Where a party uses due diligence to procure evidence to prove a material part of his case, but is prevented from procuring it by measures taken by the witnesses to conceal the facts from his knowledge, and he, therefore, submits his case to the court on an agreed statement of such facts as are known to him, and the court decide against him, he is entitled to a review, on his subsequently discovering proof of such concealed facts. *Ward* v. *Clapp*, 414.

ROBBERY.

An indictment on Rev. Sts. *c.* 125, § 13, which alleges that the defendant assaulted and robbed A., and, being armed with a dangerous weapon, did strike and wound him, is not proved, as to the wounding, by evidence that the defendant made a slight scratch on A.'s face, by rupturing the cuticle only, without separating the whole skin; nor as to the striking, by evidence that the defendant put his arms about A.'s neck, and threw him on the ground, and held him jammed down to the ground. *Commonwealth* v. *Gallagher*, 565.

Notices of New Books.

THE NEW LIBRARY OF LAW AND EQUITY, EDITED BY FRANCIS J. TROUBAT, ESQ. OF PHILADELPHIA, HON. ELLIS LEWIS, LANCASTER, WILSON M'CANDLESS, ESQ. PITTSBURG. July and August, 1845. Harrisburgh: M'Kinley & Lescure, printers.

IN relation to this work we cannot do better than to copy a portion of the prospectus.

This work contains the best productions of English law authors, without regard to priority of claim on the part of any American publisher. Such books are now notoriously too dear. The reason is, that as fast as they appear they become monopolies in the hands of booksellers in the Atlantic cities. Under the plea of right acquired by the addition of notes of American decisions, the latter claim an undivided title to those works, and set a burdensome price on them. The publishers of the work now offered to the profession throughout the Union, will not respect such titles, but will reprint the standard British law books as fast as they emanate from the London market. Should new editions of the works of such writers as Starkie, the Chittys, Stephen, and Archbold, appear, they shall also be included; and Digests of Equity and Law decisions — works which have been studiously kept out of the Law Library published at Philadelphia — shall have a place in the proposed new one, together with every new valuable English treatise on Chancery or Common Law. This work will be issued monthly, in numbers of one hundred and sixty pages, printed on fine, white paper, and good, new long primer type, at seven dollars per annum, payable half yearly.

That law books in this country are too dear is a most manifest truth; and the excuse made for this many years ago, that the profession was small, and the demand for books limited, is no longer true, when the number of lawyers in the United States is thirty thousand, at least. We see no reason why the system of cheap publications should not extend to the law as well as to every other branch of literature and science, and we are glad to see any attempt made in good faith, in any part of the country, to accomplish so desirable an end. As to the present work we can only say now, that it is beautifully printed, on good paper, and with excellent type. The names of the editors are a sufficient guaranty, that, so far as they are concerned, the work will merit success.

REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER AND EXCHEQUER CHAMBER, FROM HILARY TERM, 6 VICT., TO TRINITY VACATION, 6 VICT., BOTH INCLUSIVE. WITH TABLES OF THE CASES AND PRINCIPAL MATTERS. By R. MEESON, ESQ., and W. N. WELSBY, ESQ., of the Middle Temple, Barristers at Law. WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS. By J. I. CLARK HARE and H. B. WALLACE, Editors. Vol. XI. Philadelphia: T. & J. W. Johnson. 1845.

We are glad to learn, by an advertisement prefixed to this volume, that the publishers having purchased the remaining copies of Price's Exchequer Reports, which were reprinted in this country some years since, in a condensed form, intend completing the series from that period, and continuing it hereafter as new volumes are issued from the English press. It is well known, that since the reform in the superior courts at Westminster, and in the constitution of this court, its decisions have been in high repute. The

names of the judges, during the period comprised in the volume before us — Abinger, Parke, Aldersbn, Gurney, and Rolfe — give an assurance that an American lawyer's library will be incomplete without it. The American edition is to be issued at the low price of two dollars and a half for each English volume, reported in full. The subsequent volumes are to be reprinted as fast as they are issued from the English press, and those preceding, as fast as the mechanical operations of the work can be despatched. We wish the undertaking every success. The volume before us can be obtained in Boston of Thomas H. Webb & Co.

THE COMMON FORMS AND RULES FOR DRAWING AND ANSWERING AN ORIGINAL BILL IN CHANCERY, AS DIRECTED AND SUGGESTED BY THE NEW ORDERS OF COURT AND REPORTED CASES; MOST CAREFULLY COLLECTED BY GEORGE FARREN, Esq., Chancery Barrister. Together with the Rules of Practice for the Courts of Equity of the United States, Promulgated by the Supreme Court of the United States, January Term, 1842. With Notes and References to American and other authorities. Boston: Thomas H. Webb & Company, 1845.

We agree with the publishers of this work that they have done the students and junior members of the legal profession in America an acceptable service by reprinting this concise and esteemed little volume of Mr. Farren. It does not profess to be anything more than a kind of *vade mecum*, embodying the principal rules for drawing and answering an original bill in equity. It is beautifully executed, and appears to have been faithfully edited, containing references to the principal English and American cases. We are surprised, that the editor did not make marginal notes to the equity rules of the supreme court, which would have facilitated references to them, and which, in a handbook of this kind, are almost indispensable.

WESTERN LAW JOURNAL.—The September No. of the Western Law Journal closes the second volume. At the end of the number there is a statement that the work may now be considered as permanently established, and provision has been made for bringing increased strength to the next volume. The Hon. James T. Morehead, late governor of Kentucky, and now a senator from that state, residing in Covington, opposite to Cincinnati, will be a co-editor. We rejoice at the success of a journal, which we have before spoken of as ably conducted, and worthy of full support. We see no need of "increased strength" in the editorial department; but we are glad that the "editorial we" may henceforth be used without compunction, in common with the rest of "us."

NEW BOOKS RECEIVED. — Reports of Cases in Chancery, argued and determined in the Rolls Court, during the time of Lord Langdale, Master of the Rolls. With Notes and References to both English and American Decisions. By John A. Dunlap, Counsellor at Law. Vol. 17. Containing Beavan's Chancery Reports, Vols. 1 and 2. 1838, 1839, 1840 — 1, 2, 3 and 4 Victoria. New York: Gould, Banks & Co. Albany: William and A. Gould & Co.

The Missouri Justice; being a Compendium of the Laws relating to the Powers and Duties of Justices of the Peace, Executors, Administrators, Guardians, Constables, and Coroners, in the State of Missouri. (Adapted to the Revised Laws of 1845.) With Forms and Precedents for Attorneys, Justices of the Peace, Constables, &c. Also Deeds, Mortgages, Agreements, Bills of Sale, Lease, Powers of Attorney, &c. By John M. Krum, Judge of the Eighth Judicial Circuit, Missouri. Saint Louis: A. Fisher. 1845.

The Conspiracy to Defeat the Liberation of Governor Dorr; or the Hunkers and Algerines Identified, and their Policy Unveiled; to which is added a Report of the case Ex parte Dorr, &c. New York: John Windt, 99. Reade street. 1845. pp. 47.

Treason Defined. By Francis C. Treadwell, Counsellor at Law, and Lecturer upon the Constitution. To which are added, the Declaration of Independence, and the Constitution of the United States. New York: Published at the People's Rights office, 29, Ann Street. 1744. Price 10 cents. pp. 32.

Intelligence and Miscellany.

THE PRESS AND THE BAR. — The war between the London Times and a portion of the English bar, to which we formerly alluded, has been carried on with much spirit on both sides. The Times denies that it omitted the name of Sergeant Talfourd, from its reports of the proceedings on the Oxford circuit, under the influence of personal spite. "It was not likely, nor was it the fact, that anything done by Mr. Sergeant Talfourd could render it worth our while to single him out as a special subject of punishment; and though the public might not have noticed the fact, he was not the only barrister of the Oxford circuit whose name was excluded from our columns. Besides the coifed butterfly, whom we were charged with breaking singly on our wheel, there were a number of legal shrubs, who experienced similar treatment." The Times further states, that the resolution adopted by the Oxford circuit, to exclude from the bar mess any member of it who might report for the public journals, induced that journal to omit the names of those who had been guilty of such "an offensive piece of arrogant impertinence, directed against the press." Subsequently, however, this course was changed, until some further steps were taken by the bar. We copy the concluding paragraph of the article in the Times:

"At Shrewsbury, during the present assizes, a resolution has, however, been come to, excluding from the bar mess any member of it reporting for the public journals; and the Oxford circuit has, consequently, put itself into direct collision with the press in general. As maladies are catching, and as eruptions, showing themselves in offensive humors, are more particularly infectious, we are scarcely surprised at the Western Circuit having been attacked with the same disease as the Oxford; and both of these irritable bodies of forensic feebleness have, it seems, come to the determination that none of their members shall report for newspapers. To us it is really a matter of the smallest possible consequence; for, though we had rather receive our reports from gentlemen of the bar, who should be the best qualified to supply them, we should, of course, take measures for the employment of competent persons, in the event of barristers being prevented from undertaking a duty which has been performed over and over again by some of the profession's brightest ornaments. We are as anxious as any one to see the dignity of the bar preserved; but there is the very reverse of dignity — there is meanness of the lowest description — at the bottom of this outcry that is being raised against the practice of barristers reporting for newspapers. It is painful to make exposures of the motives of men belonging to a profession ranking as high as that of the bar, but we cannot allow meanness to cloak itself under the assumed garb of delicacy, carried to a degree of scrupulousness. We do not think it necessary to go into the question of the comparative dignity of the bar and the press, both of which must be honored according to the merits of the persons that belong to them. Whether he who acts as counsel to individuals, in their private disputes, has an office as dignified as that of him who advocates the interests of nations and of the public at large, it is not necessary for us to decide. The journalist has the whole community for his clients; but the barrister may represent a peer to-day and a pickpocket to-morrow, as the former or the latter may happen to need his services. The bar, however, with all its disadvantages, ranks deservedly high; but nothing will so tend to degrade it as the miserable efforts that are sometimes made to substitute conventionalism for dignity. The attack that is now being made on a few of its members, though ostensibly caused by their connection with the reporting department of the public press, has its origin in the worst feelings of envy, disappointment, and jealousy. How Mr. Sergeant Talfourd can lend himself, even indirectly, to a system of persecution which, had it prevailed a few years ago, must have made a victim of him,

we leave it to his own conscience to answer. Though, as we have said before, the question at issue will very little affect us, we would strongly recommend the gentlemen of the bar to make a firm stand against the oppression that is being practised against them. Conscious of doing nothing derogatory to their own dignity, and with bright examples before them of men who have been supported in the first steps of their arduous profession by their connection with the public press, those who are now pursuing the same course can afford to treat with scorn the pitiful hostility of which they are at present the subjects."

NOVEL PROCEEDING. — The following account from a London paper, we commend to the attention of silly intermeddlers in general, and to grand jurors in particular. A coroner's jury was recently assembled at the board-room of Cripplegate-ward Parochial School, Philip lane, London, to inquire into the cause of a destructive fire which broke out on the 18th, in the premises of Messrs. Bradbury, Greatorex & Beale, Aldermanbury, city, and spread to several adjacent buildings, destroying property to the amount of two or three hundred thousand pounds. The jury were summoned by Mr. J. Payne, coroner for the city of London, and were sworn "to inquire how and by what means a certain house in Aldermanbury had been lately burned." "The coroner observed that they were together in the discharge of a very important duty. Although in the present case, the fire had happily been unattended by the loss of human life, it appeared that much valuable property had been destroyed. Under an ancient law the coroner was empowered to inquire into all such cases. He was aware that the power to which he alluded had not been commonly exercised for a long time, but he found by reference to several authorities that he was justified in reviving it. Without recourse to some such proceeding there could be no inquiry at all. No investigation could be had before a magistrate unless some party were in custody; and thus property to a large amount might be destroyed without any means of ascertaining the cause of the fire. Under these circumstances he had selected the present case as a proper subject of inquiry." Numerous witnesses were then examined, and the jury found "*that the fire was the result of accident.*"

Hotch-Pot.

It seemeth that this word *hotch-pot*, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

A correspondent in Ohio suggests the propriety of publishing entire the criminal statutes of England, whether now in force, or repealed. The matter comes within the province of booksellers, and is thrown out for their consideration, but the remarks of our correspondent are worthy the attention of members of the bar also. "The treatises on criminal law are English works, and our books of precedents for indictments, with the exception, perhaps, of Davis, are written for English lawyers, to meet or conform, so far as requisite, to those English statutes. A few, and only a few, of the English criminal statutes, are published in those books, while the great body are referred to only by their different sections in these precedents. In Ohio we have no offences except such as are created by statute. These statutes, as may reasonably be supposed, are different in their character from the English, and those for the punishment of *similar* offences, no doubt, differently worded. If the pleader in Ohio, who must sufficiently follow his own statute, while he attempts to draw his *form* from an English precedent, could have the English statute, which such form in England was drawn to cover, at the same time before him, he would derive much aid; and I do not hesitate in saying, that no *Ohio* lawyer, or in the West, would fail to furnish himself with a copy of those statutes, if within his reach. And I will further add, that I am fully of the opinion, that such an edition would not fail of securing a full reward to its publisher."

We notice that the political papers are already agitating the question, as to Judge Story's successor. Indeed the matter has been talked of and written about for several months, and even years, there being an impression that the judge intended to resign. The prominent candidates appear to be Hon. Levi Woodbury, of New Hampshire, Hon. Marcus Morton, of Massachusetts, and Hon. Ether Shepley, of Maine. The Boston Post, and other leading papers, advocate the claims of Mr. Woodbury. The Augusta (Me.) Age is equally emphatic in favor of Mr. Shepley. A New Hampshire paper expresses the opinion, that it is time to "infuse some radical democracy into the supreme court." We incline to the opinion that there will be but little difficulty in settling the question, if it is not already passed upon. The successor of the judge, as Dane Professor of law, is a more difficult matter. * * * * Since the above was in type, the appointment of Mr. Woodbury has been officially announced.

In the remarks on Legislative Interference, in our last number, there were several typographical errors, which affect the sense quite materially. In the second column,

thirty-first line from the top, *period* is printed for *special*. In the third column, sixth line from the top, for *prepared* read *preferred*. In the fourth column, twenty-fifth line, for *excuse* read *cause*.

When Judge Story accepted the office of associate justice of the supreme court, at the age of 32, it was at a pecuniary sacrifice, his business at that time being worth $6000 a year. After he had been on the bench a short time, Mr. Pinckney, on going abroad, was anxious that the judge should take his business in Baltimore, which was then worth $20,000 a year, but the offer was declined.

At a late term of the court of common pleas in Barnstable county, Mass., there was not a case for the jury. Judge Ward, in dismissing them, congratulated the people on their peaceful disposition. Whether the bar joined in this feeling we have not heard. We have before intimated, that there is no particular need of a jury in that county.

When Chief Justice Parsons once complimented a red-faced constable for his expedition in serving some process, the latter set the bar in a roar, by saying with much solemnity: "I would blush, your honor, — *if I could.*"

Counsellor ——, being in the midst of a violent jury harangue, a wag rushed out of court, exclaiming that *such a swell made him sea-sick!*

Obituary Notice.

DIED: — In England, on Saturday afternoon, June 28th, 1845, Sir WILLIAM FOLLETT, late attorney general, aged 47. He was born in the year 1798. At the university he escaped the pernicious effects of the habit of cramming, to which many fine understandings have been sacrificed. After practising for a short time as a special pleader, he was called to the bar, where at first, and especially at sessions, he was not successful. In 1832 he was an unsuccessful candidate for the representation of Exeter. In 1835, he was returned for that city, which, till his death, he continued to represent in the house of commons. In 1834, he became solicitor general under Sir Robert Peel's short administration, and resigned that office in 1835; and, like Dunning, he was promoted to it before he had been called within the bar. In 1841, he was restored to place on the return of his party to power; and in 1844, on the death of Lord Abinger, and the elevation of the present chief baron, he succeeded to the situation of attorney general. He discharged its functions only for a short period, before disease rendered relaxation unavoidable. The onerous duties of the office devolved on Sir Frederic Thesiger, the solicitor general, who has succeeded to the attorney-generalship. Sir William died a victim to intense mental labor, rendered fatal by great bodily weakness. He had but recently returned from a southern climate, where his health was somewhat recruited, and might have been reëstablished, but a tenacity to office induced his return, and resulted in his death. He was considered one of the greatest lawyers of the day. His knowledge of the law was various, comprehensive, and profound; his language was clear, vigorous, and appropriate; his perception of legal analogies was rapid and infallible; his reasoning powers were of the highest order. Never misled by precipitate views or sudden emotion, his great abilities had always free play and scope to operate; and were always at his command, as little affected by disturbing causes, as if, instead of being the delicate instruments of deep thought and transcendent sagacity, they were the tools of an ordinary mechanic. As a speaker in the house of commons, he maintained his forensic reputation; and this was considered no light praise among lawyers, whose minds are much engrossed, by legal studies. His style of speaking and close argument were singularly adapted to win his audience, his manner was calm and noble, his figure imposing, his action not ungraceful, his voice mellow and harmonious. Even at the bar he had rather the air of a great magistrate expounding the principles of law, than of an advocate laboring to convince his hearers. In his mouth the most technical objection acquired an air of dignity, the worst and most desperate case an appearance of truth. Without perhaps ever reaching eloquence, he was a most persuasive speaker; and on an educated audience, the effect of the qualities we have endeavored to describe was irresistible. These endowments were embellished by the most unruffled temper, and a suavity of manner, which silenced envy, and disarmed the vehemence of opposition. No man was ever more anxious by all manly and proper means, to conciliate public favor. There was in his conduct a total absence of anything like upstart arrogance or affected superiority. Nothing could be more easy and natural than his demeanor. He appeared, says the Law Magazine, to take his elevation as a matter of course, and, what was more surprising, he persuaded his competitors to consider it in the same light. Of insult, ill nature, — of any revengeful or petty feeling, he was incapable, nor in the course of his brilliant career did he make a single personal enemy.